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In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~971~~ 42

INTERSTATE CIRCUIT, INC., et al.,
Petitioners,

v.

CITY OF DALLAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners Interstate Circuit, Inc., Rowley United Theatres, Inc., Big Tex Theatres, Inc., Stanley Warner Texas, Inc., Tivoli Realty, Inc., Brooks Theatre, Inc., Trans-Texas Theatres, Inc., Arcadia Theatre, Inc., Big "D" Theatre Company, Frank Lucchese, d/b/a The Llaw Enterprise Co., General Cinema Corporation, and Academy Theatres, Inc., pray

that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on October 18, 1966.

CITATION TO OPINION BELOW

The opinion of the District Court (R. 63-94), printed in Appendix B hereto, infra p. 1, is reported in 249 F. Supp. 19. The opinion of the Circuit Court of Appeals, printed in Appendix B, infra p. 20, is reported in 366 F. 2d 590.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 30, 1966. (R. 515, Appendix B, p. 20). Rehearing was denied on October 18, 1966. (R. 573, Appendix B, p. 516). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether Ordinance 11284 is unconstitutional because it does not guarantee a prompt final judicial decision to review actions of the Dallas Motion Picture Classification Board in classifying a motion picture as "not suitable for young persons"?

2. Whether Ordinance 11284 is unconstitutional because it prohibits the free exhibition of motion pictures on standards that are vague and ambiguous instead of limiting the restraint on free exhibition to those pictures which are obscene as that term has been defined by this Court?

If a Writ of Certiorari is granted, the proper interpretation of Art. 527 of the Texas Penal Code (Appendix A, p. 17) may become relevant. This Court may be asked to determine whether this statute pre-empted the field of regulating motion pictures from city government.

STATUTES INVOLVED

The Constitutional and Statutory provisions involved here are (1) the First Amendment to the Constitution of the United States, (Appendix A, p. 1), (2) Dallas City Ordinance 11284, (Appendix A, p. 1), (3) Art. 527 of the Texas Penal Code, (Appendix A, p. 17), and (4) Texas Rules of Civil Procedure 245, 410 and 497. (Appendix A, p. 19). These are all printed in Appendix A on the respective pages shown.

STATEMENT

On November 22, 1965, the Dallas City Council passed Ordinance No. 11284. (R. 74-92). This ordinance established the Dallas Motion Picture Classification Board and gave to it the authority to classify motion picture as "not suitable for young persons".

The standards to be used in the determination of "not suitable for young persons" are set forth in Section 46A-1(f) (R. 77). A young person is defined as a person who has not attained his sixteenth birthday. 46A-1(d). (R. 77). The ordinance makes it an offense to exhibit pictures classified as "not suitable for young persons" to anyone under sixteen years of age. Other offenses are also defined in Section 46A-4. (R. 82-84). As a defense to such a charge, it may be shown that the young person was accompanied by his par-

ent, legally appointed guardian, husband or wife, throughout the viewing of such a film. Section 46A-4(c). (R. 84).

The ordinance contains a provision for judicial review whereby the City is obligated to waive certain procedural rights and to cooperate with the exhibitor in asking Texas courts for a judicial determination confirming the Board's classification of a picture as "not suitable for young persons". Section 46A-7 (R. 86).

The exhibitors, who are here as Petitioners, brought suit asking for an injunction against the enforcement of this ordinance. In this suit they claimed that the ordinance violated their right of free communication under the First Amendment by imposing a system of censorship. (R. 2-42). The trial court denied the injunction by its judgment on December 23, 1965. (R. 58). The opinion of the trial court contains Conclusions of Law X and XI, construing the phrase "not suitable for young persons" to be valid to the extent that such films are obscene when viewed by an audience of young persons and defining the standards which would make a film obscene when viewed by an audience of young persons. (R. 72, Appendix B, p. 14).

Prior to the passage of Ordinance 11284, the City of Dallas passed its Ordinance No. 10963 on April 5, 1965. This ordinance defined young persons as being under eighteen years of age, had the same definition of "not suitable for young persons" as Ordinance No. 11284, and provided for forfeiture of equipment. It had a different provision for judicial review. (Appendix B, p. 77).

The first ordinance was held to be unconstitutional by the District Court in an opinion dated November 9, 1965, (Appendix B, p. 52), which contains the terms of the ordinance as an exhibit thereto. (Appendix B, p. 68-81).

The parties stipulated that the record of the first case as to City of Dallas Ordinance 10963 would be considered as a part of the record in the present case. (R. 55).

Regarding the requirement of a prompt judicial review, the District Court, in the present case, found that the Texas trial and appellate courts made it a practice to advance cases involving public welfare, and that the provisions for judicial review in this ordinance provided a system whereby a final decision by the Supreme Court of Texas could be obtained in less than thirty-five days (Findings of Fact at VII-X, R. 68).

The majority opinion of the Court of Appeals found this system of judicial review to be adequate. After discussing *Interstate Circuit, Inc., et al. v. City of Dallas*, 402 S.W. 2d 770 (Tex. Civ. App. 1966) err. ref. n.r.e., the Court stated:

> ". . . So long as the courts are willing to cooperate in this manner, *Freedman's* requirement for speedy judicial action on the merits and on review are satisfied." (R. 485).

The case just cited arose after the present ordinance went into effect,[1] following a classification of the motion picture *Viva Maria as* "not suitable for young persons". The exhibi-

[1] The District Court granted an injunction against the enforcement of the ordinance before January 20, 1966. (R. 61). The Court of Appeals denied an application for a further stay. (R. 469). Since the opinion is not cited as an authority, it is not included in Appendix B.

tor refused to accede to the classification and the City filed suit in the Texas district court, obtaining a temporary injunction against the showing of this picture except as "not suitable for young persons".

The history of that case in the Texas Supreme Court was tendered to the Court of Appeals in the Motion to Enlarge the Record, (R. 523-531), asking that Court to receive a certificate from the Clerk of the Supreme Court of Texas showing the dates of filing in that court together with the date and action taken by that court on the applications for writ of error on the *Viva Maria* case and the ten cases immediately before and after it. This certificate showed that 65 days passed from the filing for Petition for Writ of Error before the Texas Supreme Court ruled on this matter. This motion was denied. (R. 573).

REASONS FOR GRANTING THE WRIT

1. The decision of the court below in the instant case is in direct conflict with the doctrine of *Freedman v. State of Maryland*, 380 U.S. 51. Regarding any system of censorship, that decision stated

> "... the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specific brief period, either issue a license or go to court to restrain showing the film. . . . Therefore, the procedure must also assure the prompt final judicial decision to minimize the deterent effect of an interim and possibly erroneous denial of a license." (p. 58-59)

Both lower courts recognized this requirement of a prompt, final judicial determination. However, they appear to have overlooked the requirement that prompt judicial review be assured by statute or authoritative judicial construction. The requirement of such a prompt, final judicial decision under a system *established by statute or authoritative judicial construction* protects the right of free speech guaranteed by the First Amendment. It is a matter of common knowledge that trial and appellate courts have broad discretion in setting cases on their dockets. Texas Rules of Civil Procedure 245, 410, and 497 govern the setting of cases in the Texas district courts, courts of civil appeals, and supreme court. (Appendix A, p. 19). There appears to be a direct conflict between *Freedman's* requirement of a system of prompt, final judicial review assured by statute or authoritative judicial construction and a system of cooperation which depends upon each court's discretion in determining what preference, if any, it will give to cases involving the City.

2. Clearly, the questions presented here are important to all phases of the motion picture industry and to every city or state that undertakes any regulation of the exhibition of motion pictures. Prior opinions of this Court have suggested that some regulation of free speech may be tolerated to protect children, *Jacobellis v. State of Ohio*, 378 U. S. 184, 195, but the many opinions on censorship are not under-

stood to permit any system of restraint that is contingent upon the discretion of various courts in setting their respective dockets.

3. The judgments in the lower courts appear to be erroneous because of a mistake of fact. On November 9, 1965, in construing the first Ordinance, the District Court found

> "The Statutes of Texas and the Texas Rules of Civil Procedure, when applied to the Ordinance (10963) before the Court, do not provide for a speedy review of the rights of the Plaintiffs sufficient to satisfy the requirements of the case of *Freedman v. State of Maryland*, 380 U.S. 51." (Appendix B, p. 82),

and concluded

> ". . . there being no provision in the Texas Statutes for prompt judicial review in the trial and appellate courts, and experience being that risk of delay is built into Texas procedure, the Ordinance in question lacks sufficient procedural safeguards designed to obviate the dangers of a censorship system. (citing cases)." (Appendix B, p. 65).

There being no change in the Texas Statutes, Rules of Civil Procedure, or judicial decision on these matters between the date of that opinion and December 23, 1965, when the opinion in the instant case was rendered, the present ordinance provides a legal system of judicial review only insofar as the courts are willing to cooperate. (R. 485). There was no evidence to sustain the finding that the present ordinance provides a timetable where a final decision of the Texas Supreme Court could be obtained in thirty-five days.

(Appendix B, p. 11). In fact, the *Viva Maria* case demonstrated this to be a mistake. (R. 523-532).

Chief Justice Dixon of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas testified that in setting cases his court was governed by Rule 410 (R. 385). He further testified that he had not checked to determine the time that had expired between the Motion to Advance the case and the time the case was submitted for argument. (R. 392). Judge Guittard of the 14th District Court said that he had never had a case that involved obscenity or obscene movies in his court (R. 378), and that he had not had a case in his court involving the City of Dallas or other governmental agency where there was a joint motion to advance the case, but that this would be grounds for a motion to advance. (R. 378-379). He did not know of any statute in a district or an appellate court in Texas that would require the advancement of a case such as did arise under Ordinance 11284. (R. 383).

Bill Rees, an attorney, testified concerning a chart he had made from the records of the Court of Civil Appeals. This chart, Exhibit 14 (R. 456-458), gave information relating to thirteen cases where the City of Dallas was a party and where motions to advance had been filed by one or both of the litigants. The shortest time between the motion to advance and the submission of a case was sixty-one days, while the average time was seventy-eight days. (R. 402-403).

The evidence presented does not sustain a finding that an exhibitor may, as a matter of right, obtain a complete, final determination as to his rights in thirty-five days from the date on which the City files suit to enjoin the showing of a film.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

TOBOLOWSKY, HARTT, SCHLINGER & BLALOCK,

By .....
Grover Hartt, Jr.

By .....
Edwin Tobolowsky
3525 Southland Center,
Dallas, Texas,
Attorney for Petitioners.

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of January, 1967.

.....

APPENDIX A

United States Constitution

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Ordinance No. 11,284

An Ordinance Providing for the Amendment of Chapter 46 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas by adding thereto a new chapter known as Chapter 46A;Providing for the establishment of a Motion Picture Classification Board; Outlining classification procedures; Defining Offenses relating to the exhibition of films classified "Not Suitable for Young Persons"; Providing for the issuance, revocation and suspension of licenses; Providing for judicial review; Defining public nuisances; Providing for injunctive relief; Providing for an exception to State law; Providing for a severability clause; Providing for a Penalty; Providing for the repeal of Ordinance No. 10963 enacted by the City Council on April 5, 1965, and enacting this ordinance in lieu thereof; and Declaring an Emergency.

WHEREAS, the City Council after investigation on the part of the members of said Council and the hearing of evidence and testimony at a public hearing called for that

purpose, is of the opinion and finds that certain commercially produced motion picture films are one of the contributing causes to juvenile delinquency, sexually promiscuous behavior, and along with other factors, tend to incite criminal behavior on the part of young persons; and

WHEREAS, the City Council is of the opinion that legislative action should be taken by this Council for the purpose of classifying the movies to which such young persons of school age are admitted without proper supervision; and

WHEREAS, the City Council is of the opinion and finds that a great portion of said movies are available for screening and for showing more than thirty days prior to their initial exhibition and that the benefits to the public will far exceed the burden placed upon the motion picture industry by having said movies screened and classified; and

WHEREAS, the City Council is of the opinion and finds that motion picture films possess a greater capacity for good and for evil among young persons of school age than most other modes of expression and are, therefore, affected with a public interest; Now, Therefore,

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF DALLAS:

SECTION 1. That Chapter 46 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas, be, and it is hereby amended by adding thereto a new chapter

known as Chapter 46A, consisting of Sections 46A-1 through 46A-11 inclusive, which shall read as follows:

"CHAPTER 46A"

MOTION PICTURE CLASSIFICATION ORDINANCE

§ 46A-1 Definition of Terms
§ 46A-2 Establishment of Classification Board
§ 46A-3 Classification Procedure
§ 46A-4 Offenses
§ 46A-5 License
§ 46A-6 Revocation or suspension of license
§ 46A-7 Judicial Review
§ 46A-8 Public Nuisances
46A-9 Injunctions
§ 46A-10 Exception to State Law
§ 46A-11 Severability Clause

Section 46A-1. *Definition of Terms:*

(a) "Film" means any motion picture film or series of films, whether full length or short subject, but does not include newsreels portraying actual current events or pictorial news of the day.

(b) "Exhibit" means to project a film at any motion picture theatre or other public place within the City of Dallas to which tickets are sold for admission.

(c) "Exhibitor" means any person, firm or corporation which exhibits a film.

(d) "Young person" means any person who has not attained his sixteenth birthday.

(e) "Board" means the Dallas Motion Picture Classification Board established by Section 46A-2 of this ordinance.

(f) "Not suitable for young persons" means:

(1) Describing or portraying brutality, criminal violence or depravity in such a manner as to be, in the judgment of the Board, likely to incite or encourage crime or delinquency on the part of young persons; or

(2) Describing or portraying nudity beyond the customary limits of candor in the community, or sexual promiscuity or extra-marital or abnormal sexual relations in such a manner as to be, in the judgment of the Board, likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest.

A film shall be considered 'likely to incite or encourage' crime delinquency or sexual promiscuity on the part of young persons, if, in the judgment of the Board, there is a substantial probability that it will create the impression on young persons that such conduct is profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted. A film shall be considered as appealing to 'prurient interest' of young persons, if in the judgment of the Board, its calculated or dominant effect on young persons is substantially to arouse sexual desire. In determining whether a film is 'not suitable for young persons', the Board shall consider the

film as a whole, rather than isolated portions, and shall determine whether its harmful effects outweigh artistic or educational values such film may have for young persons.

(g) 'Classify' means to determine whether a film is:

(1) Suitable for young persons, or;

(2) Not suitable for young persons.

(h) 'Advertisement' means any commercial promotional material initiated by an exhibitor designed to bring a film to public attention or to increase the sale of tickets to exhibitions of same, whether by newspaper, billboard, motion picture, television, radio, or other media within or originating within the City of Dallas.

(i) 'Initial exhibition' means the first exhibition of any film within the City of Dallas.

(j) 'Subsequent exhibition' means any exhibition subsequent to the initial exhibition, whether by the same or a different exhibitor.

(k) 'File' means to deliver to the City Secretary for safekeeping as a public record of the City of Dallas.

(l) 'Classification order' means any written determination by a majority of the Board classifying a film, or granting or refusing an application for change of classification.

(m) The term 'Board' as used and applied in subsection (a) of Section 46A-7 shall include the City of Dallas when attempting to enforce this ordinance and the City Attorney of the City of Dallas when representing the Board or the City of Dallas.

Section 46A-2. *Establishment of Board.*

There is hereby created a Board to be known as the Dallas Motion Picture Classification Board which shall be composed of a Chairman and Eight Members to be appointed by the Mayor and City Council of the City of Dallas, whose terms shall be the same as members of the City Council. Such members shall serve without pay and shall adopt such rules and regulations as they deem best governing their action, proceeding and deliberations and time and place of meeting. These rules and regulations shall be subject to approval of the City Council. If a vacancy occurs upon the Board by death, resignation or otherwise, the governing body of the City of Dallas shall appoint a member to fill such vacancy for the unexpired term.

The Chairman and all Members of the Board shall be good, moral, law-abiding citizens of the City of Dallas, and shall be chosen so far as reasonably practicable in such a manner that they will represent a cross section of the community. Insofar as practicable, the members appointed to the Board shall be persons educated and experienced in one or more of the following fields: art, drama, literature, philosophy, sociology, psychology, history, education, music, science or other related fields. The City Secretary shall act as Secretary of the Board.

Section 46A-3. *Classification Procedure:*

(a) Before any initial exhibition, the exhibitor shall file a proposed classification of the film to be exhibited, stating the title of the film and the name of the producer, and giving

a summary of the plot and such other information as the Board may by rule require, together with the classification proposed by the exhibitor. The Board shall examine such proposed classification, and if it approves same, shall mark it 'approved' and file it as its own classification order. If the Board fails to act, that is, either file a classification order or hold a hearing within five (5) days after such proposed classification is filed, the proposed classification shall be considered approved.

(b) If upon examination of the proposed classification a majority of the Board is not satisfied that it is proper, the Chairman shall direct the exhibitor to project the film before any five (5) or more members of the Board, at a suitably equipped place and at a specified time, which shall be the earliest time practicable with due regard to the availability of the film. The exhibitor, or his designated representative, may at such time make such statement to the Board in support of his proposed classification and present such testimony as he may desire. Within two (2) days, the Board shall make and file its classification of the film in question.

(c) Any initial or subsequent exhibitor may file an application for a change in the classification of any film previously classified. No exhibitor shall be allowed to file more than one (1) application for change of classification of the same film. Such application shall contain a sworn statement of the grounds upon which the application is based. Upon filing of such application, the City Secretary shall bring it immediately to the attention of the Chairman of the Board, who

upon application by the exhibitor shall set a time and place for a hearing and shall notify the applicants and all interested parties, including all exhibitors who may be exhibiting or preparing to exhibit the film. The Board shall view the film and at such hearing, hear the statements of all interested parties, and any proper testimony that may be offered, and shall within two (2) days thereafter make and file its order approving or changing such classification. If the classification of a film is changed as a result of such hearing to the classification 'not suitable for young persons', the exhibitors showing the film shall have seven (7) days in which to alter their advertising and audience policy to comply with such classification.

(d) Upon filing by the Board of any classification order, the City Secretary shall immediately issue and mail a notice of classification to the exhibitor involved and to any other exhibitor who shall request such notice.

(e) A classification shall be binding on any subsequent exhibitor unless and until he obtains a change of classification in the manner above provided.

Section 46A-4. *Offenses:*

(a) It shall be unlawful for any exhibitor or his employee:

(1) To exhibit any film which has not been classified as provided in this ordinance.

(2) To exhibit any film classified 'not suitable for young persons' if any current advertisement of such film by such exhibitor fails to state clearly the classification of such film.

(3) To exhibit any film classified 'not suitable for young persons' without keeping such classification posted prominently in front of the theatre in which such film is being exhibited.

(4) Knowingly to sell or give to any young person a ticket to any film classified 'not suitable for young persons'.

(5) Knowingly to permit any young person to view the exhibition of any film classified 'not suitable for young persons'.

(6) To exhibit any film classified 'not suitable for young persons' or any scene or scenes from such a film, or from an unclassified film, whether moving or still, in the same theatre and on the same program with a film classified 'suitable for young persons'; provided that any advertising preview or trailer containing a scene or scenes from an unclassified film or a film classified 'not suitable for young persons' may be shown at any time if same has been separately classified as 'suitable for young persons' under the provisions of Section 46A-3 of this ordinance.

(7) To make any false or willfully misleading statement in any proposed classification, application for change of classification, or any other proceeding before the Board.

(8) To exhibit any film classified 'not suitable for young persons' without having in force the license hereinafter provided.

(b) It shall be unlawful for any young person:

(1) To give his age falsely as sixteen (16) years of age or over, for the purpose of gaining admittance to an exhibition of a film classified 'not suitable for young persons'.

(2) To enter or remain in the viewing room of any theatre where a film classified 'not suitable for young persons' is being exhibited.

(3) To state falsely that he or she is married for the purpose of gaining admittance to an exhibition of a film classified 'not suitable for young persons'.

(c) It shall be unlawful for any person:

(1) To sell or give to any young person a ticket to an exhibition of a film classified 'not suitable for young persons'.

(2) To make any false or willfully misleading statement in an application for change of classification or in any proceeding before the Board.

(3) To make any false statements for the purpose of enabling any young person to gain admittance to the exhibition of a film classified 'not suitable for young persons'.

(d) To the extent that any prosecution or other proceeding under this ordinance, involves the entering, purchasing of a ticket, or viewing by a young person of a film classified 'not suitable for young persons', it shall be a valid defense that such young person was accompanied by his parent or legally appointed guardian, husband or wife, throughout the viewing of such film.

Section 46A-5. *License:*

Every exhibitor holding a motion picture theatre or motion picture show license issued pursuant to Chapter 46 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas shall be entitled to issuance of a license by the City Secretary to exhibit films classified 'not suitable for young persons'.

Section 46A-6. *Revocation or suspension of license:*

Whenever the City Attorney or any person acting under his direction, or any ten (10) citizens of the City of Dallas, shall file a sworn complaint with the City Secretary stating that any exhibitor has repeatedly violated the provisions of this ordinance, or that any exhibitor has persistently failed to use reasonable diligence to determine whether those seeking admittance to the exhibition of a film classified 'not suitable for young persons' are below the age of sixteen (16), the City Secretary shall immediately bring such complaint to the attention of the City Council who shall set a time and place for hearing such complaint and cause notice of such hearing to be given to the complainants and to the exhibitor involved. The City Council shall have authority to issue subpoenas requiring witnesses to appear and testify at such hearing, and any party to such hearing shall be entitled to such process. If, after hearing the evidence, the City Council shall find the charges in such complaint to be true, it shall issue and file an order revoking or suspending the license above provided, insofar as it grants the privilege of showing such classified pictures, for a specific period not to exceed one (1) year, or may issue a reprimand if it is satisfied that such violation will not continue.

The City Council likewise, after notice and hearing, may revoke or suspend the license of any exhibitor who has refused or unreasonably failed to produce or delayed the submission of a film for review, when requested by the Board.

Section 46A-7. *Judicial Review.*

(a) Within two (2) days after the filing of any classification by the Board, other than an order approving the classification proposed by an exhibitor, any exhibitor may file a notice of non-acceptance of the Board's classification, stating his intention to exhibit the film in question under a different classification. Thereupon it shall be the duty of the Board to do the following:

(1) Within three (3) days thereafter to make application to a District Court of Dallas County, Texas, for a temporary and a permanent injunction to enjoin such defendant-exhibitor, being the exhibitor who contests the classification, from exhibiting the film in question contrary to the provisions of this ordinance.

(2) To have said application for temporary injunction set for hearing within five (5) days after the filing thereof. In the event the defendant-exhibitor appears at or before the time of the hearing of such temporary injunction, waives the notice otherwise provided by the Texas Rules of Civil Procedure, and requests that at the time set for such hearing the Court proceed to hear the case under the Texas Rules of Civil Procedure for permanent injunction on its merits, the Board shall be required to waive its application for temporary injunction and shall join in such request. In the event the defendant-exhibitor does not waive notice and/or does not request an early hearing on the Board's application for permanent injunction, it shall nevertheless be the duty of the Board to obtain the earliest possible setting for such hearing under the provisions of State law and the Texas Rules of Civil Procedure.

(3) If the injunction is granted by the trial court and the defendant-exhibitor appeals to the Court of Civil Appeals, the Board shall waive any and all statutory notices and times as provided for in the Texas

State Statutes and Texas Rules of Civil Procedure, and shall within five (5) days after receiving a copy of appealing exhibitor's brief, file its reply brief, if required, and be prepared to submit the case upon oral submission or take any other reasonable action requested by the appealing exhibitor to expedite the submission of the case to the Court of Civil Appeals, and shall upon request of the appealing exhibitor, jointly with such exhibitor, request the Court of Civil Appeals to advance the cause upon the docket and to give it a preferential setting the same as is afforded an appeal from a temporary injunction or other preferential matters.

(4) If the Court of Civil Appeals should by its judgment affirm the judgment of the trial court granting the injunction and the appealing exhibitor should file an application for writ of error to the Texas Supreme Court, the Board shall be required to waive any and all notices and times as provided for in the Texas State Statutes and the Texas Rules of Civil Procedure, and shall within five (5) days after receiving a copy of the application for writ of error, file its reply brief, if required, and be prepared to submit the case upon oral submission or take any other reasonable action requested by the appealing exhibitor to expedite the submission of the case to the Supreme Court and shall upon request of the appealing exhibitor, jointly with such exhibitor, request the Supreme Court to advance the cause upon the docket and to give it a preferential setting the same as is afforded an appeal from a temporary injunction or other preferential matters.

(5) If the District Court denies the Board's application for injunction, and the Board elects to appeal, the Board shall be required to waive all periods of time allowed it by the Texas Rules of Civil Procedure and if a motion for a new trial is required, shall file said motion within two (2) days after the signing of the judgment, (or on the following Monday if said period ends on a Saturday or Sunday, or on the day following if

the period ends on a Legal Holiday), shall not amend said motion and shall obtain a hearing on such motion within five (5) days' time. If no motion for new trial is required as a prerequisite to an appeal under the Texas Rules of Civil Procedure, the Board shall not file such a motion. Within ten (10) days after the judgment is signed by the District Court denying such injunction or within ten (10) days after the order overruling the Board's motion for new trial is signed, if such motion is required, the Board shall complete all steps necessary for the perfection of its appeal to the Court of Civil Appeals, including the filing of the Transcript, Statement of Facts and Appellant's brief. Failure to do so shall constitute an abandonment of the appeal. On filing the record with the Court of Civil Appeals, the Board shall file a motion to advance requesting the Court to give a preferential setting the same as is afforded an appeal from a temporary injunction or other preferential matters.

(6) If the Court of Civil Appeals reverses the trial court after the trial court has granted an injunction, or if the Court of Civil Appeals refuses to reverse the trial court after that court has failed to grant an injunction, then if the Board desires to appeal from the decision of the Court of Civil Appeals by writ of error to the Supreme Court of the State of Texas, it must file its motion for rehearing within two (2) days of rendition of the decision of the Court of Civil Appeals (or on the following Monday, if said period ends on a Saturday or Sunday, or on the day following if the period ends on a Legal Holiday), and shall file its application for writ of error within ten (10) days after the Court of Civil Appeals' order overruling such motion for rehearing, and failure to do so shall waive all rights to appeal from the decision of the Court of Civil Appeals. At the time of filing the application for writ of error, the Board shall also request the Supreme Court to give the case a preferential setting and advance the same on the docket.

(b) The filing of such notice of non-acceptance shall not suspend or set aside the Board's order, but such order shall be suspended at the end of ten (10) days after the filing of such notice unless an injunction is issued within such period.

(c) Failure of any exhibitor to file the notice of non-acceptance within two (2) days as required in Subdivision (1) of this Section 46A-7, shall constitute acceptance of such classification order and such exhibitor shall be bound by such order in all subsequent proceedings except such proceedings as may be had in connection with any application for change of classification under Subdivision (c) of Section 46A-3 above.

Section 46A-8. *Public Nuisances:*

The following acts are declared to be public nuisances:

(a) Any violation of Subdivisions (1), (2), (3), or (6), of Subdivision (a) of Section 46A-4 of this ordinance.

(b) Any exhibition of a film classified as 'not suitable for young persons' at which more than three (3) young persons are admitted.

(c) Any exhibition of a film classified as 'not suitable for young persons' by an exhibitor who fails to use reasonable diligence to determine whether persons admitted to such exhibition are persons under the age of sixteen (16) years.

(d) Any exhibtion of a film classified as 'not suitable for young persons' by an exhibitor who has been convicted of as many as three (3) violations of Sub-

divisions (4) or (5) of Subdivision (a) of Section 46A-4 of this ordinance in connection with the exhibition of the same film.

Section 46A-9. *Injunctions:*

Whenever the Board has probable cause to believe that any exhibitor has committed any of the acts declared in Section 46A-8 above to be a public nuisance, the Board shall have the duty to make application to a court of competent jurisdiction for an injunction restraining the commission of such acts.

Section 46A-10. *Exception to State Law:*

Nothing in this ordinance shall be construed to regulate public exhibitions pre-empted by Article 527 of the Penal Code of the State of Texas, as amended.

Section 46A-11. *Severability Clause:*

Should any section, subsection, sentence, provision, clause or phrase be held to be invalid for any reason, such holding shall not render invalid any other section, subsection, sentence, provision, clause or phrase of this ordinance, and the same are deemed severable for this purpose."

SECTION 2. That any person who shall violate any provisions of this ordinance shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine not to exceed Two Hundred Dollars ($200.00) and each offense shall be deemed to be a separate violation and punishable as a

separate offense, and each day that a film is exhibited which has not been classified according to this ordinance shall be a separate offense.

SECTION 3. That Ordinance No. 10963 heretofore enacted by the City Council of the City of Dallas on April 5, 1965, be and the same is hereby in all things repealed and held for naught, and this ordinance is enacted in lieu thereof.

SECTION 4. The fact that Ordinance No. 10963 previously passed by the City Council of the City of Dallas has been declared to be unenforceable in the Courts by the Federal District Court, creates an urgency and an emergency in the preservation of the public peace, comfort and general welfare and requires that this ordinance shall take effect immediately from and after its passage, and it is accordingly so ordained.

Texas Penal Code .

Art. 527. 509 Acts involving obscene articles, objects and materials; fines and penalties; exemptions

Section 1. Whoever shall knowingly photograph, act in, pose for, model for, print, sell, offer for sale, give away, exhibit, televise, publish, or offer to publish, or have in his possession or under his control, or otherwise distribute, make, display, or exhibit any obscene book, magazine, story, pamphlet, paper, writing, card, advertisement; circular, print, pictures, photograph, motion picture film, image, cast, slide, figure, instrument, statue, drawing, phonograph record,

mechanical recording, or presentation, or other article which is obscene, shall be fined not more than One Thousand Dollars ($1,000) nor imprisoned more than one (1) year in the county jail or both.

Section 2. Whoever shall knowingly offer for sale, sell, give away, exhibit, televise, or otherwise distribute, make, display, or exhibit any obscene book, magazine, story, pamphlet, paper, writing, card, advertisement, circular, print, pictures, photograph, motion picture film, image, cast, slide, figure, instrument, statue, drawing, phonograph record, mechanical recording, or presentation, or other article which is obscene to a minor shall be fined not more than Two Thousand, Five Hundred Dollars ($2,500) nor imprisoned in the county jail more than two (2) years or both.

Section 3. For purposes of this article the word "obscene" is defined as whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests. Provided, further, for the purpose of this article, the term "contemporary community standards" shall in no case involve a territory or geographic area less than the State of Texas.

Section 4. Whoever shall be convicted for the second time of a violation of this article shall be deemed guilty of a felony and shall be punished by confinement in the State penitentiary for not more than five (5) years or by a fine of not more than Ten Thousand Dollars ($10,000) or by both such fine and imprisonment.

Section 5. It shall be a defense to any charges brought hereunder if such prohibited matter or act shall be regularly in use in any bona fide, religious, educational or scientific institution or the subject of a bona fide scientific investigation.

The provisions of this Act shall not apply to any motion picture produced or manufactured as commercial motion pictures which (1) have the seal under the Production Code of the Motion Picture Association of America, Inc.; or (2) legally move in interstate commerce under Federal Law; or (3) are legally imported from foreign countries into the United States and have been passed by a Customs Office of the United States Government at any port of entry.

The provisions of this Act shall not apply to any daily or weekly newspaper.

Section 6. The district courts of this State and the judges thereof shall have full power, authority, and jurisdiction, upon application by any district or county attorney within their respective jurisdictions, to issue any and all proper restraining orders, temporary and permanent injunctions, and any other writs and processes appropriate to carry out, and enforce the provisions of this Act. As amended Acts 1955, 54th Leg., p. 386, ch. 107, § 1; Acts 1957, 55th Leg., p. 425, ch. 203, § 1; Acts 1961, 57th Leg., p. 1041, ch. 461, § 1.

Texas Rules of Civil Procedure

Rule 245. Assignment of Cases for Trial

The court shall provide by rule for the placing of actions upon the trial calendar.

(a) without request of the parties or

(b) upon request of a party and notice to the other parties or

(c) in such other manner as the courts deem expedient. Precedence shall be given to actions entitled thereto by any statute or rule.

Rule 410. Order of Deciding Cases

Cases shall be decided in the order in which they are filed, but the following cases shall have precedence of all others:

(a) Cases in which the Railroad Commission is a party.

(b) Cases in which the State is a party.

(c) Cases given precedence by law or these rules.

(d) Cases submitted on oral argument for all parties to the cause.

(e) Appeals from interlocutory orders.

(f) Such other cases as the court, by order or rule, may direct.

Rule 497. Order of Trial of Causes

Causes may be tried in such order as the justices of the Supreme Court may deem to the best interest and convenience of the parties or their attorneys.

B-1

INTERSTATE CIRCUIT, INC., et al.,

Plaintiffs,

v.

CITY OF DALLAS,

Defendant.

Civ. A. No. 3-1303.

United States District Court
N. D. Texas,
Dallas Division.
Dec. 23, 1965.

Action by motion picture exhibitors for injunction with respect to Dallas city ordinance providing for classification of motion pictures as suitable or not suitable for young people. The District Court, Hughes, J., held that the ordinance was within police power of city, and its enactment could not be set aside merely because compliance would result in financial loss, and that the ordinance provisions, which provided timetable for final action in the courts on issue of classification, were sufficient to insure exhibitor's right to speedy trial and to guarantee due process, but that provision relating to revocation or suspension of license of exhibitor to show motion picture classified not suitable for young persons for a period of up to one year was void as denial of right to show films not obscene to adult audience.

Order in accordance with opinion.

. *Municipal Corporations*

Powers of city of Dallas are plenary subject to limitation that its charter and ordinances shall contain nothing incon-

sistent with State or Federal Constitution or general laws enacted by the legislature. Vernon's Ann. Tex. St. Const. art. 11, § 5.

2. *Municipal Corporations*

Texas statute prohibiting obscene pictures but excluding pictures produced or manufactured as commercial motion pictures having seal of a specified corporation, legally moving in interstate commerce under federal law, or legally imported from foreign countries leaves field of regulation of excluded pictures to city. Vernon's Ann. Tex. P. C. art. 527; Vernon's Ann. Tex. St. Const. art. 11 § 5.

3. *Theaters and Shows*

Power given to Dallas board established by ordinance to classify films as suitable or not suitable for young persons is reasonable to prevent incitement or encouragement of crime, delinquency, or sexual promiscuity by young persons. U.S.C.A. Const. Amend. 1.

4. *Municipal Corporations*

Debate of wisdom of legislative determination of a city that certain films can cause moral deterioration in the young and resultant tendency towards juvenile delinquency is not function of court where conclusion of the legislative body is not wholly unreasonable.

5. *Municipal Corporations*
Theaters and Shows

Legislative inference from available data before Dallas city council that certain films have tendency to incite or encourage criminal, delinquent, and sexually promiscuous behavior by young persons was not so unreasonable and arbitrary as to be invalid, and function of the court was to accept the legislative judgment of casual relationship as valid. U.S.C.A. Const. Amend. 1.

6. *Infants*

States' authority over children's activities is broader than over like activities of adults.

7. *Obscenity*

Fact that certain films are not obscene under definition of Supreme Court of the United States does not necessarily render them not obscene when viewed by audience of young persons as defined in Dallas city ordinance providing for motion picture classification as suitable or not suitable for young persons. U.S.C.A. Const. Amend. 1.

8. *Municipal Corporations*

Dallas ordinance section defining the phrase "not suitable for young persons" as certain descriptions of brutality, criminal violence, depravity, nudity, sexual promiscuity, or extramarital or abnormal sexual relations is valid to extent that the films are obscene when viewed by audience of young persons. U.S.C.A. Const. Amend. 1.

9. *Obscenity*

Film is "obscene" when viewed by audience of young persons if to the average young person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest, substantially goes beyond the customary limits of candor in description or representation of such matters to the average young person, and is utterly without redeeming social importance. U.S.C.A. Const. Amend. 1.

10. *Constitutional Law*

Constitutional limits of free expression in the nation may not vary with state lines.

11. *Constitutional Law*

Contemporary community standards by which status of suitability of a motion picture for viewing by young persons is tested are national. U.S.C.A. Const. Amend. 1.

12. *Municipal Corporations*

Ordinance which provided for method of classification of motion pictures as suitable or unsuitable for young persons was within police power of city of Dallas, and enactment of the ordinance could not be set aside merely because compliance would result in financial loss.

13. *Constitutional Law*
Municipal Corporations

Ordinance provisions setting forth procedure for classifying motion pictures as suitable or unsuitable for young peo-

ple and providing for timetable for final action in the courts on issue of classification were sufficient to insure exhibitor's right to speedy determination and to guarantee due process. U.S.C.A. Const. Amend. 14.

14. *Municipal Corporations*
Theaters and Shows

Considering practice of trial and appellate courts of Texas to give preferential settings to cases involving public interest, Dallas ordinance providing for classification of motion pictures as suitable or unsuitable for young people and requiring waiver of notice of court proceedings by classification board contained sufficient procedural safeguards to obviate dangers of censorship system. U.S.C.A. Const. Amend. 1.

15. *Constitutional Law*
Theaters and Shows

Dallas ordinance provision relating to revocation or suspension of license of exhibitor to show motion picture classified not suitable for young persons for a period of up to one year was void as denial of right to show films not obscene to adult audience. U.S.C.A. Const. Amend. 1.

—o—

Grover Hartt, Jr., Edwin Tobolowsky, Tobolowsky, Hartt, Schlinger & Blalock, Dallas, Tex., for plaintiffs.

N. Alex Bickley, City Atty, of Dallas, Ted P. MacMaster, Asst. City Atty., Dallas, Tex., for defendant.

HUGHES, District Judge.

This matter came on for hearing on the application of the Plaintiffs for a preliminary injunction and the parties by stipulation having agreed that this application would be considered for a permanent injunction and the Court having considered the pleadings on file and having heard the evidence and argument of counsel, and having been fully advised in the premises of all particulars, does make and enter the following findings of fact and conclusions of law. Where appropriate, certain of the findings and conclusions contained in Interstate Circuit, Inc., et al. v. City of Dallas, CA—3—1006, 247 F. Supp. 906 (N. D. Tex., Nov. 9, 1965), have been incorporated herein.

FINDINGS OF FACT

I.

Plaintiff, Interstate Circuit, Inc., is a Delaware corporation authorized to do business in Texas, with its principal place of business in Dallas, authorized to exhibit motion pictures. It operates the following theatres in the City of Dallas: Majestic Theatre, 1925 Elm Street; Palace Theatre, 1623 Elm Street; Tower Theatre, 1905 Elm Street; Esquire Theatre, 3419 Oak Lawn; Inwood Theatre, Lovers Lane and Inwood Road; Circle Theatre, 2711 Storey Lane; Forest Theatre, 1918 Forest Avenue; Wilshire Theatre, Skillman and Mockingbird Lane; and Lakewood Theatre, 1825 Abrams Road.

Plaintiff Rowley United Theatres, Inc., is a Delaware corporation, authorized to do business in Texas, with its

principal place of business in Dallas, authorized to exhibit motion pictures. It operates the following theatres in the City of Dallas: Jefferson Drive-In Theatre, 4506 West Jefferson; Town and Country Drive-In Theatre, Forest Lane and Plano Road; Lone Star Drive-In Theatre, 4600 Lawnview; Hampton Road Drive-In Theatre, 2833 South Hampton; Wynnewood Theatre, 275 Wynnewood Village; Vogue Theatre, 2010 West Jefferson; and Texas Theatre, 231 West Jefferson.

Plaintiff Big Tex Theatres, Inc., is a Texas corporation with its principal place of business in Dallas, authorized to exhibit motion pictures. It operates the following theatres in the City of Dallas: Granada Theatre, 3524 Greenville Avenue; Kiest Boulevard Drive-In Theatre; Crest Theatre, 2603 South Lancaster; and Avenue Theatre, 4923 Columbia.

Plaintiff Stanley Warner Texas, Inc., is a Delaware corporation authorized to do business in Texas with its principal place of business in Dallas and is authorized to exhibit motion pictures. It operates the following theatres in the City of Dallas: Chalk Hill Drive-In Theatre, 4501 West Davis; Buckner Drive-In Theatre, 3311 North Buckner Boulevard; and Denton Road Drive-In Theatre, 11325 Harry Hines Boulevard.

Plaintiff Tivoli Realty, Inc., is a Texas corporation with its principal place of business in Dallas and is authorized to exhibit motion pictures. It operates the Delman Theatre, 3319 Raleigh Street.

Plaintiff Brooks Theatre, Inc., is a Texas corporation with its principal place of business in Dallas, Texas, and is

authorized to exhibit motion pictures. It operates the South Loop Theatre, 3016 East Ledbetter Drive.

Plaintiff Trans-Texas Theatre, Inc., is a Texas corporation with its principal place of business in Dallas and is authorized to exhibit motion pictures. It operates the Capri Theatre, 1913 Elm Street.

Plaintiff Arcadia Theatre, Inc., is a Texas corporation with its principal place of business in Dallas and is authorized to exhibit motion pictures. It operates the Arcadia Theatre at 2005 Greenville Avenue.

Plaintiff Big "D" Theatre Company, Dallas, Texas, operates the Big "D" Drive-In Theatre, 6123 Harry Hines Boulevard.

Plaintiff Frank Lucchese, doing business as Llaw Enterprise Company, exhibits motion pictures. He operates the State Theatre, 3217 Thomas Avenue, City of Dallas.

Plaintiff General Cinema Corporation is a Delaware corporation authorized to do business in Texas. It operates the following theatres in the City of Dallas: Cinema North Park I, and Cinema North Park II.

And Plaintiff Academy Theatres, Inc. is a Texas corporation with its principal place of business in Dallas. It operates the Festival Theatre, 3104 Maple Avenue in the City of Dallas.

II.

Defendant, City of Dallas, is a home rule city. On November 22, 1965 Ordinance No. 11,284 was enacted in the form

attached as Appendix "A" hereto after the Council heard testimony on the subject. On December 6, 1965 Ordinance No. 11,298 was enacted amending Ordinance No. 11,284 in the form attached as Appendix "B". All subsequent references will be to Ordinance No. 11,284, as amended.

III.

The Plaintiffs claim relief under the First and Fourteenth Amendments to the Constitution of the United States.

IV.

The Plaintiffs are engaged in the business of exhibiting commercial motion pictures in their respective theatres. In each theatre there is a large investment in personal property, projection equipment, and related accessories.

V.

Plaintiffs exhibit commercial talking motion pictures. These pictures are generally made in California, if of domestic manufacture, or they are made in foreign countries and imported through a port of entry of the United States Customs Office. The positive prints of said commercial motion pictures pass freely in interstate commerce in and out of the State of Texas. By the owners of the copyright of such motion pictures, the motion pictures are licensed for exhibition to the respective Plaintiffs, at one or more of the theatres operated by the Plaintiffs according to the terms of a particular license agreement. At all times the copyright ownership and the title of the motion picture re-

main in the producer or the distributor, and none of the prints are owned by the Plaintiffs. They have no rights except by virtue of the license agreement mentioned above.

VI.

A large portion of the motion pictures released for exhibition in the City of Dallas are available for screening and for showing 30 days or more prior to their initial exhibition. Others are generally available for screening in the City of Dallas by prior arrangement.

VII.

Section 46 A-7 entitled "Judicial Review", in case of non-acceptance of the Board's classification, requires the Board to take steps to obtain a judicial review of the Order of the Board, provides a timetable for Court action by the Board, and requires the Board to waive notice of certain court proceedings.

VIII.

District Courts in Dallas County, Texas have made it a practice to give preferential settings to cases in which the City of Dallas is a party, particularly those involving the public welfare.

IX.

The Appellate Courts of Texas have likewise made it a practice to advance cases involving the public welfare and the need for immediate action.

X.

In cases where the exhibitor-defendant loses before the Board, in the District Court, and in the Court of Civil Appeals, under the timetable provided by the Ordinance in question and under the customary procedure in the Texas Courts, a final decision in the Supreme Court of Texas could be obtained in less than thirty-five days.

CONCLUSIONS OF LAW

I.

The Court has jurisdiction of the parties and the subject matter. 28 U.S.C. §1331.

II.

[1] The powers of the City of Dallas derive from Article 11, Section 5, of the Texas Constitution, Vernon's Ann. St. and are plenary, subject to the limitation that its charter and ordinances shall contain nothing inconsistent with the State or Federal Constitution or the general laws enacted by the Legislature. Janus Films, Inc. v. City of Fort Worth, 354 S.W. 2d 597, 599 (Tex. Civ. App.), writ of error refused per curiam, 163 Tex. 616, 358 S.W. 2d 589 (1962).

III.

[2] Article 527 of the Penal Code of the State of Texas prohibiting obscene pictures but excluding from its provisions motion pictures produced or manufactured as commercial motion pictures which (1) have the seal under the Production Code of the Motion Picture Association of

America, Inc., or (2) legally move in interstate commerce under Federal law, or (3) are legally imported from foreign countries into the United States and have passed the Customs Office of the United States Government at any port of entry, leaves the field of regulation of such pictures excluded from Article 527 to the City. Janus Films, Inc. v. City of Fort Worth, supra.

IV.

Since some commercial motion pictures are excluded from Article 527 of the Penal Code of the State of Texas, as set out in the above conclusion, the power to regulate such pictures is delegated to the City of Dallas and are subject to regulation by the City. Janus Films, Inc. v. City of Fort Worth, supra.

V.

[3] Recognizing the legitimate and indeed exigent interest of the State and localities throughout the nation in the dissemination of material deemed harmful to children, the power given to the Dallas Motion Picture Classification Board established by Ordinance 11,284 of the City of Dallas to classify films (1) "suitable for young persons" or (2) "not suitable for young persons" is reasonable in order to prevent the incitement or encouragement of crime, delinquency, or sexual promiscuity on the part of young persons. Jacobellis v. State of Ohio, 378 U.S. 184, 195, 84 S. Ct. 1676, 12 L. Ed. 2d 793 (1964); In re Louisiana News Co. v. Dayries, 187 F. Supp. 241, 247-248 (E. D. La. 1960); State v. Settle, 90 R. I. 195, 156 A. 2d 921 (1959).

VI.

[4] It is not the function of the Court to debate the wisdom of a legislative determination that certain films can cause a moral deterioration in the young and a resultant tendency towards juvenile delinquency, where the conclusion of the legislative body is not wholly unreasonable. Williams v. Mayor and City Council of Baltimore, 289 U.S. 36, 42, 53 S. Ct. 431, 77 L. Ed. 1015 (1933).

VII.

[5] The legislative inference from available data before the City Council that certain films have a tendency to incite or encourage criminal, delinquent, and sexually promiscuous behavior on the part of young people is not so unreasonable and arbitrary as to be invalid, and such inference not being unreasonable, it is the function of the Court to accept the legislative judgment of the causal relationship between certain films and the societal evil as valid. Williams v. Mayor and City Council of Baltimore, supra.

VIII.

An enactment aimed at combating criminal, delinquent and sexually promiscuous behavior on the part of young persons is plainly within the powers of the City Council, if it does not transgress the boundaries fixed by the Constitution for freedom of expression.

IX.

[6, 7] The States' authority over children's activities is broader than over like activities of adults, and the fact that

certain films are not obscene under the Supreme Court definition in Roth v. United States, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957), and affirmed in Jacobellis v. State of Ohio, 378 U.S. 184, 84 S. Ct. 1676, 12 L. Ed. 2d 793 (1964), does not necessarily render them not obscene when viewed by an audience of young persons, as defined in Section 46 A-1 of the Ordinance, so as to protect them under the First Amendment to the Federal Constitution. Jacobellis v. State of Ohio, supra, 378 U.S. at 195, 84 S. Ct. 1676, 12 L. Ed. 2d 793; Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 168, 64 S. Ct. 438, 88 L. Ed. 645 (1944); State v. Settle, supra; In re Louisiana News Co. v. Dayries, supra. See Lockhart & McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5, 85-88 (1960); Fagan, Obscenity Control and Minors—The Case for a Separate Standard, 10 Catholic Lawyer 270 (1960); Note, "For Adults Only": The Constitutionality of Governmental Film Censorship by Age Classification, 69 Yale L.J. 141 (1959).

X.

[8] Section 46 A-1(f) defining the phrase "Not suitable for young persons" is valid to the extent that such films are obscene when viewed by an audience of young persons. See Lockhart & McClure, Censorship of Obscenity, supra, 45 Minn. L. Rev. at 85-88.

XI.

[9] A film that is obscene when viewed by an audience of young persons is one which, to the average young person,

applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest, substantially goes beyond the customary limits of candor in description or representation of such matters to the average young person, and is utterly without redeeming social importance. See Lockhart & McClure, supra, 45 Minn. L. Rev. at 87-88 n. 469.

XII.

[10, 11] Since it would be intolerable for "the constitutional limits of free expression in the Nation" to "vary with state lines", the contemporary community standards by which the status of a motion picture is tested are national standards. See Jacobellis v. State of Ohio, supra, 378 at 192-195, 84 S. Ct. at 1680-1682, and dissenting opinion of Mr. Justice Harlan, at 203-204, 84 S. Ct. at 1686-1687.

XIII.

[12] The subject of the Ordinance being within the police power of the City, its action in enacting said Ordinance within its range of discretion cannot be set aside merely because compliance would result in financial loss. See, e. g., Bowles v. Willingham, 321 U.S. 503, 517-518, 64 S. Ct. 641, 88 L. Ed. 892 (1944).

XIV.

[13] Section 46 A-3 entitled "Classification Procedure" and Section 46 A-7 entitled "Judicial Review" providing for

a timetable for final action in the Courts on the issue of classification are sufficient to insure the exhibitor's right to a speedy determination of the issue and to guarantee due process of law. See Freedman v. State of Maryland, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965); Trans-Lux Distributing Corp. v. Maryland State Board of Censors, 240 Md. 98, 213 A. 2d 235 (1965). Cf. United States v. One Carton Positive Motion Picture Film, 247 F. Supp. 450 (S. D. N. Y. Nov. 17, 1965).

XV.

[14] Section 46 A-7 requiring waiver of notice of court proceedings by the Board and considering the practice in the trial and appellate courts of Texas to give preferential settings to cases involving the public interest, the Ordinance in question contains sufficient procedural safeguards to obviate the dangers of a censorship system. See citations under XIV.

XVI.

[15] Section 46 A-6 of the Ordinance relating to revocation or suspension of the exhibitor's license to show a picture classified "not suitable for young persons" for a period of up to one year is null and void due to its denial of the exhibitor's right to show such films which are not obscene to an adult audience, as guaranteed by the First Amendment to the Constitution. See Butler v. State of Michigan, 352 U.S. 380, 77 S. Ct. 524, 1 L. Ed. 2d 412 (1957).

Ordinance 11284 quoted in appendix A of this petition is included in the opinion. It is omitted here.

APPENDIX B

ORDINANCE NO. 11298

An Ordinance amending the first paragraph of Section 46A-2 of Chapter 46A of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas by providing for alternate members of the Dallas Motion Picture Classification Board; Providing that Chapter 46A, save and except as amended herein, shall remain in full force and effect; and Declaring an Emergency.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF DALLAS:

SECTION 1. That the first paragraph of Section 46A-2 of Chapter 46A of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas, be, and it is hereby amended so that it shall hereafter read as follows:

> "There is hereby created a Board to be known as the Dallas Motion Picture Classification Board which shall be composed of a Chairman and Eight Members to be appointed by the Mayor and City Council of the City of Dallas, whose terms shall be the same as members of the City Council; provided, however, that the City Council may appoint three (3) alternate members of said Board who shall serve in the absence of one or more of the regular members when requested to do so by the Chairman of the Board. Such members shall serve without pay and shall adopt such rules and regulations as they deem best governing their action, proceeding and deliberations and time and place of meeting. These

rules and regulations shall be subject to approval of the City Council. If a vacancy occurs upon the Board by death, resignation or otherwise, the governing body of the City of Dallas shall appoint a member to fill such vacancy for the unexpired term."

SECTION 2. That Chapter 46A of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas, save and except as amended herein, shall remain in full force and effect.

SECTION 3. The fact that the Dallas Motion Picture Classification Ordinance providing for the appointment of a Dallas Motion Picture Classification Board is inadequate creates an urgency and an emergency in the preservation of the public peace, comfort and general welfare and requires that this ordinance shall take effect immediately from and after its passage, and it is accordingly so ordained.

APPROVED AS TO
FORM:
N. ALEX BICKLEY,
City Attorney

PASSED: ..... DEC. 6 1965
CORRECTLY ENROLLED ..... DEC. 6 1965

N. Alex Bickley
City Attorney

ATTEST:
Harold G. Shank
City Secretary.

Ted P. MacMaster
Assistant City Attorney

B-20

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 23306

INTERSTATE CIRCUIT, INC., et al,
Appellants-Appellees,

v.

CITY OF DALLAS,
Appellee-Appellant,

(AND REVERSE TITLE)

Appeals from the United States District Court for the Northern District of Texas.

(August 30, 1966.)

Before WISDOM and THORNBERRY, Circuit Judges, and COX, District Judge.*

THORNBERRY, Circuit Judge: The City of Dallas, Texas, passed Ordinance No. 11284[1] requiring the classification of motion pictures as "suitable" or "not suitable" for young persons. "Young person" is defined as one under the

* William Harold Cox, United States District Judge for the Southern District of Mississippi, sitting by designation.

[1] The ordinance is reprinted in full in the appendix.

age of sixteen. In the preamble the ordinance recites the conclusion of the City Council that motion pictures "are one of the contributing causes to juvenile delinquency, sexually promiscuous behavior, and along with other factors, tend to incite criminal behavior on the part of young persons . . . ." It is also noted that a great portion of the movies shown are available for screening more than thirty days prior to their initial exhibition and that the benefits of classification to the public will far exceed the burden placed on the motion picture industry. "Not suitable for young persons" is defined as

> "(1) Describing or portraying brutality, criminal violence or depravity in such manner as to be, in the judgment of the Board, likely to incite or encourage crime or delinquency on the part of young persons; or
>
> "(2) Describing or portraying nudity beyond the customary limits of candor in the community, or sexual promiscuity or extramarital or abnormal sexual relations in such a manner as to be, in the judgment of the Board, likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest.
>
> "A film shall be considered 'likely to incite or encourage' crime delinquency or sexual promiscuity on the part of young persons, if, in the judgment of the Board, there is a substantial probability that it will create the impression on young persons that such conduct is profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted. A film shall be considered as appealing to 'prurient interest' of young persons, if in the judgment of the Board, its calculated or dominant effect on young persons is substantially to arouse sexual desire. In determining whether a film is 'not suitable for young persons,' the Board shall consider the film as

> a whole, rather than isolated portions, and shall determine whether its harmful effects outweigh artistic or educational values such film may have for young persons."

Exhibitors are required to submit a proposed classification and a summary of the film's plot to the nine-member Board. If the Board is not satisfied with the proposed classification, a showing of the film is arranged. The details of the classification procedure, time limits and provisions for appeal will be discussed later.[2]

It is a violation of the ordinance to exhibit any film which has not been classified. If a film has been found not suitable for young persons, it is unlawful to fail to state the classification in any advertisement; to fail to post the classification prominently in front of the theatre; knowingly to sell or give a ticket to any young person or to permit one to view the film and to exhibit such a film with one classified as suitable for young persons.[3] A young person accompanied by his parent, guardian or spouse may view any film, whatever its classification.

The ordinance provides for the issuance of a license to entitle the holder to exhibit films classified as not suitable for young persons and revocation of that license for up to one year for repeated violations of the ordinance or for failure to exercise ordinary diligence to determine those below the age of sixteen. Violation of any provision of the ordinance is a misdeamenor punishable by fine up to $200.00 for each offense.

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[2] See IV, infra.

[3] There are other violations not particularly relevant to this proceeding. See Appendix, § 46A-4.

A group of Dallas exhibitors filed a complaint in federal District Court seeking a declaratory judgment that the ordinance in whole or part was unconstitutional and an injunction to prevent the City from enforcing the ordinance.[4]

Judge Hughes concluded that the City had the power to pass such an ordinance, that Article 527 of the Texas Penal Code prohibiting obscene pictures does not prevent this type of regulation by the City, that the classification was reasonable in order to prevent the incitement of juvenile crime and delinquency, and that a film may be obscene when viewed by young people although not obscene as to adults. She found the phrase "Not suitable for young persons" to be valid only to the extent

> "that such films are obscene when viewed by an audience of young persons. A film that is obscene when viewed by an audience of young persons is one which, to the average young person, applying contemporary community standards, the dominent theme of the material taken as a whole appeals to the prurient interest, substantially goes beyond the customary limits of candor in description or representation of such matters to the average young person, and is utterly without redeeming social importance."

Interstate Circuit, Inc. v. City of Dallas, N.D. Texas 1965, 249 F. Supp. 19, 24. The procedure for review of the Board's classifications was found to be sufficient to insure the exhibitors' right to a speedy determination of the issues and to guarantee due process of law. The District Court, how-

[4] A similar Dallas classification ordinance was considered by Judge Hughes and found invalid in part. Interstate Circuit, Inc. v. City of Dallas, N.D. 1965, 247 F. Supp. 906. The present ordinance was passed to replace the one involved in that first case before Judge Hughes.

ever, held the clause providing for revocation of the exhibitor's license to show films classified as not suitable for young persons invalid since it would deny exhibitors the right to show films not obscene as to adults.[5]

Both the exhibitors and the City have appealed. A number of national distributors of films have been allowed to join the exhibitors on appeal as amici curiae.

I.

Before examining the details of the Dallas ordinance, we must first decide the basic question of whether any movie classification ordinance may be found valid. Our study of the Supreme Court opinions indicates an affirmative answer.

When the Court first held that motion pictures were protected by the First Amendment in *Joseph Burstyn, Inc. v. Wilson*, 1952, 343 U.S. 495, 502-3, 72 S. Ct. 777, 780-81, ... L. Ed. ...., ..., it considered the argument that "motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression." Its conclusion was that "if there be capacity for evil it may be relevant in determining the permissible scope of community control, but it does not authorize substantially unbridled censorship . . . ." The Court also noted that:

> "To hold that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, however, is not the end of our problem. It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every

[5] This ruling was based on Butler v. State of Michigan, 1957, 352 U.S. 380, 77 S. Ct. 325, ... L. Ed. . . . . (see discussion, p. 6, infra), and is not contested here by the City of Dallas.

> kind at all times and all places. That much is evident from the series of decisions of this Court with respect to other media of communication of ideas. Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems."

In *Butler v. State of Michigan*, 1957, 352 U.S. 380, 77 S. Ct. 524, ... L. Ed. 2d ....., the Court found unconstitutional a Michigan statute which made the distribution to the general public of publications "tending to the corruption of the morals of youth" a misdemeanor. The Court concluded that "quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innoncence . . . surely . . . is to burn the house to roast the pig." It is significant that the statute was invalidated solely because it reduced adults to reading material fit for juveniles. The recognition by the Court that the state had failed to reasonably restrict its legislation "to the evil with which it is said to deal" suggests the probable validity of a statute which is properly drawn to protect children without restricting First Amendment rights of adults.

A few months after the decision in *Butler*, the Court handed down the landmark case of *Roth v. United States*, 1957, 354 U.S. 476, 77 S. Ct. 1304, ... L. Ed. 2d ...., holding obscenity outside the protection of the First Amendment and establishing the standard for judging obscenity—"whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." In adopting this test,

the Court specifically rejected the *Hicklin* test[6] which judged obscenity by the effect of an isolated passage upon particularly susceptible persons. *Id.* at 489, 77 S. Ct. at 1311, ... L. Ed. 2d at ....

The *Roth* doctrine was reaffirmed and clarified in *Jacobellis v. State of Ohio*, 1964, 378 U.S. 184, 84 S. Ct. 1676, ... L. Ed. 2d .... The Court noted that "a work cannot be proscribed unless it is 'utterly' without social importance . . ." and " 'goes substantially beyond customary limits of candor in description or representation of such matters.' " *Id.* at 191, 84 S. Ct. at 1680, ... L. Ed. 2d at .... The "community" in the *Roth* test was described as the "society at large" rather than the inhabitants of a particular state or locale. The important portion of the opinion[7] for our present consideration, however, is a paragraph by Justice Brennan which states:

> "We recognize the legitimate and indeed exigent interest of States and localties throughout the Nation in preventing the dissemination of material deemed harmful to children. But that interest does not justify a total suppression of such material, the effect of which would be to 'reduce the adult population * * * to reading only what is fit for children. *Butler v. Michigan*, 352 U.S. 380, 383, 77 S. Ct. 524, 526. *State and local authorities might well consider whether their objectives in this area would be better served by laws aimed specifically at preventing distribution of objectionable material to children, rather than at totally prohibiting its dissemination.* [footnote: See *State v. Settle*, 90 R.I. 195, 156 A. 2d

[6] Regina v. Hicklin [1868] L.R. 3 Q.B. 360

[7] The Court had some difficulty in arriving at a consensus in *Jacobellis*. Justice Brennan announced the judgment of the Court and was joined in his opinion by Justice Goldberg. Writing concurring opinions were Justice Black (joined by Justice Douglas), Justice Stewart, and Justice Goldberg. Justice White concurred without an opinion. Dissenting opinions were written by Chief Justice Warren (joined by Justice Clark) and by Justice Harlan.

921 (1959)] Since the present conviction is based upon exhibition of the film to the public at large and not upon its exhibition to children, the judgment must be reviewed under the strict standard applicable in determining the scope of the expression that is protected by the Constitution."[8]

378 U.S. at 195, 84 S. Ct. at 1682, ... L. Ed. 2d at .... (Emphasis added)

The Rhode Island case, *State v. Settle*, *supra*, which the Court cites with approval, upheld a conviction under a statute making the sale of pornographic material to persons under the age of eighteen a crime.[9]

Although only Justice Goldberg joined in Justice Brennan's opinion, three other Justices indicates that they would uphold a statute aimed at the protection of children without a resulting restriction on the adult population. Chief Justice Warren, in an opinion joined by Justice Clark, observed that

[8] Four years before *Jacobellis*, Judge Wisdom made a similar suggestion in *In Re Louisiana News Co.*, E.D. La. 1960, 187 F. Supp. 241, 247 (three-judge district court):

"While we have no occasion here to pass on the constitutionality of such a law, it would seem that a state might enact a valid statute 'specifically designed to protect its children' from suggestive books and magazines that are not too rugged for grown men and women, without at the same time burning the house down to roast the pig by restricting everyone else to reading such fiction as Boy's Life at the magazine stand and The Five Little Peppers at the bookstand."

[9] "Every person who shall wilfully or knowingly sell, lend, give away, show, advertise for sale or distribute commercially to any person under the age of eighteen years . . . any pornographic motion picture, or any still picture or photograph or any book, . . . the cover or content of which exploits, is devoted to, or is principally made up of descriptions of illicit sex or sexual immorality or which is obscene, lewd, lascivious, or indecent, or which consists of pictures of nude or partially denuded figures posed or presented in a manner to provoke or arouse lust or passion or to exploit sex, lust or perversion for commercial gain or any article or instrument of indecent or immoral use shall be punished . . . ."
R.I. Gen. Laws 1956, § 11-31-10.

a work may be "inoffensive under most circumstances but, at the same time, 'obscene' in the extreme when sold or displayed to children." *Id.* at 201, 84 S. Ct. at 1685 . . . L. Ed. 2d at . . . Justice Harlan makes clear that he favors allowing the state a wide scope in the field of regulating the distribution of obscene materials to children.[10] *Id.* at 76-77, 83 S. Ct. at 642-43, ... L. Ed. 2d at ..... Thus, it appears that at least five of the Justices involved in *Jacobellis* believe that the state may protect children from the distribution of material which could not be classified as obscene as to adults.[10a]

This position indicates an acceptance of the concept of "variable obscenity" as contrasted with "constant obscenity." Constant obscenity assumes that "obscenity is an inherent quality of material that renders it unfit for everyone in all circumstances. . . ." Lockhart & McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5, 85 (1960); see Gerber, A Suggested Solution to the Riddle of Obscenity, 112 U. Pa. L. Rev. 834, 848-49 (1964); Note, "For Adults Only": The Constitutionality of Governmental Film Censorship by Age Classification, 69 Yale L.J. 141 (1959). On the other hand, variable obscenity rejects the idea of obscenity as inherent in the material and determines obscenity "by its appeal to and effect upon the

[10] Justice Harlan refers to his earlier dissent in *Bantam Books, Inc. v. Sullivan*, 1963, 372 U.S. 58, 76-77, 83 S. Ct. 631. 642-43, 9 L. Ed. 2d 584, ..., in which he discussed the problem at greater length.

[10a] The New York Court of Appeals, relying upon this reasoning, has recently upheld a New York obscenity statute barring distribution of certain books to minors which are not necessarily obscene as to adults. *Bookcase, Inc. v. Broderick*, N. Y. Ct. App. (No. . . . ., July 7, 1966).

audience to which the material is primarily directed." Lockhart & McClure, *supra*, at 85. Under constant obscenity, a work not obscene as to society at large by definition could not be found to be obscene as to any particular group such as children. Variable obscenity, however, permits a finding that material is obscene when distributed to one group although it would not be held obscene if it were primarily distributed to another group. For example, hard-core pornography would not be constitutionally "obscene" if directed exclusively to scientists for research purposes, even though such materials would clearly be obscene if distributed to the general public. *United States v. 31 Photographs*, S.D.N.Y. 1957, 156 F. Supp. 350.

Any doubt as to the Court's position on variable obscenity was dispelled by the recent trilogy of obscenity cases: *Ginzburg v. United States*, 1966, ... U.S. ....., 86 S. Ct. 942, ... L. Ed 2d .....; *Mishkin v. State of New York*, 1966, ... U.S. ....., 86 S. Ct. 958, ... L. Ed. 2d .....; and *A Book, Etc. v. Attorney General*, 1966, ... U.S. ....., 86 S. Ct. 975, ... L. Ed. 2d ...... While assuming in *Ginzburg* that the publications were not obscene in other contexts, the Court upheld a conviction on evidence of "exploitation of interests in titillation by pornography . . . with respect to material lending itself to such exploitation through pervasive treatment or description of sexual matters . . . ." ..... U.S. at ....., 86 S. Ct. at 950, ... L. Ed. 2d at ..... Thus the Court rejected the proposition that obscenity is a matter inherent in the publication under all circumstances.

Mishkin v. State of New York, supra, involves a situation more closely analogous to our present consideration. Mishkin induced the publication and sale of a number of books "depicting various deviant sexual practices, such as flagellation, fetishism, and lesbianism . . . ." His defense to the resulting obscenity prosecution was that these books did not appeal to the prurient interest of the "average" person and that the State had therefore failed to satisfy the requirements of the *Roth* test. In rejecting this contention, the Court made a significant adjustment of the *Roth*-prurient-appeal test in adopting a variable-obscenity approach to the problem:

> *"Where the material is designed for and primarily disseminated to a clearly defined deviat sexual group, rather than the public at large, the prurient-appeal requirement of the Roth test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group.* The reference to the 'average' or 'normal' person in Roth, 354 U.S. at 489-490, 77 S. Ct. at 1311, does not foreclose this holding. [citing Lockhart and McClure's article, supra]. In regard to the prurient-appeal requirement, the concept of the 'average' or 'normal' person was employed in Roth to serve the essentially negative purpose of expressing our rejection of that aspect of the *Hicklin* test . . . that made the impact on the most susceptible person determinative. We adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group; and since our holding requires that the recipient group be defined with more specificity than in terms of sexually immature persons, it also avoids the inadequacy of the most-susceptible-person facet of the *Hicklin* test."

..... U.S. at ....., 86 S. Ct. at 939-64, ... L. Ed. 2d at .....
(Emphasis added.) The determination that the obscenity of material may be measured by its appeal to the prurient interest of its intended and probable recipient group is a repudiation of the basic concept of the constant obscenity theory and clearly marks the adoption of the variable obscenity doctrine by the Court.

The acceptance of this variable obscenity approach indicates that the Supreme Court would uphold a properly drawn statute designed to regulate material obscene as to children so long as the legislation does not have the effect of reducing adults to a level of consumption fit for children. See *Butler v. State of Michigan, supra.* The motion picture classification statute presents a prime example of a means of protecting children without appreciably restricting adults. Lockhart and McClure in their excellent article on the censorship of obscenity[11] discussed the effects of such classification statutes and noted that they may indirectly prevent adults from seeing "Adults Only" films since the economic loss resulting from the exclusion of children from the audience may deter the production and exhibition of such movies. The same economic deterrent, however, is present when the general public is excluded from the audience which may properly utilize certain pornographic works suitable only for scientific research. *Cf. United States v. 31 Photographs, supra; Ginzburg v. United States, supra,* at ....., 86 S. Ct. at 948-49, ... L. Ed. 2d at ...... For this reason we conclude, as did Lockhart and McClure, that a properly drafted classi-

[11] Lockhart & McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5, 87 (1960).

fication statute is a constitutional method of protecting children from motion pictures obscene as to them.

II.

The determination that a constitutional classification statute may be drawn brings us to the consideration of the Dallas ordinance presented here. It seeks to classify motion pictures as not suitable for young persons when they describe or portray certain levels of brutality, criminal violence, depravity, nudity, sexual promiscuity and extra-marital or abnormal sexual relations.[12] As noted earlier, Judge Hughes upheld the ordinance only to the extent "that such films are obscene when viewed by an audience of young persons." The classification standard, as restricted by Judge Hughes, clearly complies with the concepts of variable obscenity as adopted by the Supreme Court.

The more difficult question is whether the classification standard may go beyond restriction of obscenity to regulate the showing of movies depicting such things as excessive brutality and criminal violence as the Dallas ordinance seeks to do. Although numerous attempts to employ non-obscenity standards have been rejected by the Supreme Court,[13] those cases do not control this question for they involve total censorship statutes prohibiting the distribution of the offending material rather than limited classification ordinances affecting only those under sixteen years of age. See Note, 69 Yale L.J. 141, 150 (1959). Of course, the principal obstacle to

[12] See quoted portion of ordinance, *supra*, p. 2.

[13] See cases cited in Note, 69 Yale L. J. 141, 142 n. 5-10, 150 n. 64 (1959).

classification based upon standards other than obscenity is the First Amendment, an obstacle not applicable to classification solely on grounds of obscenity. See *Joseph Burstyn, Inc. v. Wilson, supra.* The City, however, argues that the restriction of the First Amendment rights of minors may be justified by the overriding concern of society for the protection of its youth. This argument finds support in *Prince v. Commonwealth of Mass.*, 1944, 321 U.S. 158, 64 S. Ct. 438, ... L. Ed. ....., which involved a state law prohibiting a parent or guardian from permitting a minor within his control from selling magazines on public streets. Both the child and his guardian who was prosecuted for violating this statute were Jehovah's Witnesses, and the offense was the sale by the child of pamphlets published by that religious sect. The defense was based solely on freedom of religion under the First Amendment and the parental rights guaranteed by the due process clause. The Court recognized the child's right to exercise his religion and the parent's right to train and encourage the child's religious belief, but concluded that

> ". . . the family itself is not beyond regulation in the public interest, as against a claim of religious liberty . . . . And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion

freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.

"... The catalogue need not be lengthened. *It is sufficient to show* what indeed appellant hardly disputes, *that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction.*"

Id. at 166-67, 64 S. Ct. at 442, ... L. Ed. at ..... (Emphasis added.) The Court conceded that the legislation would have been invalid if applied to the sale of such items by adults but stated that

"the mere fact a state could not wholly prohibit this form of adult activity . . . does not mean it cannot do so for children. . . .

"The state's authority over children's activities is broader than over like actions of adults . . . A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers, within a broad range of selection."

Id. at 168, 64 S. Ct. at 443, L. Ed. at .....: The restriction of the child's First Amendment freedom of religion allowed in *Prince* is analogous to the attempted classification of movies under the Dallas ordinance so as to regulate the child's First Amendment freedom of speech. Additional support for the City's position is found in the paragraph quoted from *Jacobellis*[13a] which suggests legislation to prevent "the dis-

[13a] This Court recently made reference to this same quotation from *Jacobellis* in upholding an ordinance prohibiting the exhibition of motion pictures visible from a public road depicting "bare buttocks or the bare female breast" as legislation "reasonably aimed at preventing the exhibition of objectionable pictures to

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semination of material deemed harmful to children."[14] The use of "harmful to children" rather than "obscene as to children" may indicate that Justice Brennan envisioned the type of broad legislation found in the Dallas ordinance rather than a restricted obscenity standard. Justice Brennan also stated that, since the statute in *Jacobellis* was not restricted in its effect to the protection of children, the Court must apply a "strict standard" in determining the constitutionality of the restriction.

As forceful as these arguments may be for the expansion of the scope of the classification standards, the long history of the misuse of the censorship power convinces us that the standard for classification must be restricted to the control of obscenity. In considering the classification approach, we cannot ignore the activities of the cenors in the context of total censorship statutes.[15] Nor can we assume that their level of performance will materially differ in applying broad standards under classification statutes. Because of the very real threat to the adult's freedom of speech and expression, the Supreme Court has apparently limited censorship af-

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children." *Chemline, Inc. v. City of Grand Prairie*, 5th Cir. 1966, . . . F. 2d . . . . (No. 22254, July 6, 1966, Pg. 11). Since the effect of the ordinance on First Amendment freedoms was found to be slight in comparison to the substantial public interest to be protected, this Court rejected the suggested necessity of satisfying the "clear and present danger" test. This Court even stated that it is improper "to ignore the special interest of children by failing to give separate consideration to the harmful effects of such pictures upon them." *Id. at* . . . . .

[14] See quotation, page 8, supra.

[15] See Justice Warren's description of the abuse in the censoring function catalogued in *Times Film Corp. v. City of Chicago*, 1961, 365 U. S. 43, 66-73, 81 S. Ct. 391, 407-09, ... L. Ed. 2d . . . ., ... (dissenting opinion).

fecting adults to a narrowly defined area of obscenity. Although a classification ordinance measuring "obscenity" by its appeal to children rather than by its effect on society in general necessarily affords the censor a broader area of regulation, it does not set him "adrift upon a boundless sea amid a myriad of conflicting currents . . . with no charts" or vest in him "unlimited restraining control over motion pictures . . ." as statutes containing broader standards might do. See *Joseph Burstyn, Inc. v. Wilson*, 1952, 343 U.S. 495, 504-05, 72 S. Ct. 777, 782, ... L. Ed ....., ... While we recognize the interest of society in protecting children, we find even the child's freedom of speech too precious to be subjected to the whim of the censor.

III.

Both the exhibitors and the distributors contend that the classification standards of the Dallas ordinance are unconstitutionally vague. Since we have concluded that the District Court was correct in limiting the application of the "not suitable for young persons" classification to films that are "obscene when viewed by an audience of young persons," we need not consider the alleged vagueness of provisions of the ordinance which purport to classify on a basis other than obscenity.

The Supreme Court considered the "vagueness" argument in *Roth* in its review of the federal obscenity statute ("obscene, lewd, lascivious, or filth . . . or other publication of an indecent character") and a California statute ("obscene or indecent"). It was urged that the statutes did not provide

reasonably ascertainable standards of guilt and therefore violated the constitutional requirements of due process.

> "Many decisions have recognized that these terms of obscenity statutes are not precise. This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. '* * * [T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices * * *.' . . . These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark '* * * boundaries sufficiently distinct for judges and juries fairly to administer the law * * *.'"

354 U.S. at 491-92, 77 S. Ct. at 1312-13, ... L. Ed at ..... The classification standard of the Dallas Ordinance as restricted by the District Court[16] conveys the "sufficiently definite warning as to the proscribed conduct" required by the Supreme Court in *Roth*.

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[16] The portion of the classification standard which remains under the District Court's judgment is noted below in italics. The District Court's definition of obscenity as to young persons further modifies the italized language.

> "(1) Describing or portraying brutality, criminal violence or depravity in such manner as to be, in the judgment of the Board, likely to incite or encourage crime or delinquency on the part of young persons; or
>
> "(2) *Describing or portraying nudity beyond the customary limits of candor in the community, or sexual promiscuity or extra-marital or abnormal sexual relations in such a manner as* to be, in the judgment of the Board, likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or *to appeal to their prurient interest.*
>
> "A film shall be considered likely to incite or encourage crime delinquency or sexual promiscuity on the part of young persons, if, in the judgment of the Board, there is a substantial probability that it will create the impression on young persons that such conduct is profitable, desirable, acceptable,

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IV.

The minimum procedural safeguards necessary for a motion picture censorship system to avoid constitutional infirmity were discussed at length by the Supreme Court in *Freedman v. State of Maryland*, 1965, 380 U.S. 51, 56-61, 85 S. Ct. 734, 738-40, ... L. Ed. 2d ....., ... The Court first noted that "any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." The Court enunciated the following requirements:

> (1) The censor must have the burden of proving that the film is unprotected expression.
>
> (2) Although advance submission of all films may be required, the procedure must require a judicial determination to impose a valid final restraint.
>
> (3) The exhibitor must be assured that the censor will, within a specified brief period, either issue a license or go to court to restrain the showing of the film.
>
> (4) Any restraint imposed prior to final judicial determination on the merits must be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution.
>
> (5) Prompt final judicial decision must be assured.

The Court observed that "it is common knowledge that films are scheduled well before actual exhibition . . . . One possible scheme would be to allow the exhibitor or distributor to sub-

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praiseworthy or commonly accepted. *A film shall be considered as appeal to 'prurient interest' of young persons, if in the judgment of the Board, its calculated or dominant effect on young persons is substantially to arouse sexual desire. In determining whether a film is 'not suitable for young persons,' the Board shall consider the film as a whole, rather than isolated portions, and shall determine whether its harmful effects outweigh artistic or educational values such film may have for young persons.*"

mit his film early enough to ensure an orderly final disposition of the case before the scheduled exhibition date—far enough in advance so that the exhibitor could safely advertise the opening on a normal basis." *Ibid.*

Briefly summarized, the Dallas ordinance provides for the following procedures: The exhibitor files a proposed classification prior to exhibition. If the Board fails to act within five days, the proposed classification is considered approved. If the Board is not satisfied, it must view the film at the "earliest time practicable," give the exhibitor opportunity to support his proposal, and make its decision within two days thereafter. If any exhibitor files notice of non-acceptance of the Board's classification within two days after its filing, it then becomes the Board's duty to seek a temporary and permanent injunction from the Dallas district court within three days and to apply for hearing on the temporary injunction within five days. If the exhibitor requests that the matter be considered on the merits of the permanent injunction at the hearing, the Board must waive its application for temporary injunction and join the exhibitor's request. If the injunction is granted and the exhibitor appeals to the Court of Civil Appeals, the Board must waive all statutory notices, file its reply to the exhibitor's brief within five days, and join the exhibitor in any motion to advance the cause on the docket. Similar provisions apply to appeal by the exhibitor to the Texas Supreme Court and to appeal by the

Board from adverse decisions of the district court or the Court of Civil Appeals. If no injunction has been granted within ten days of notice of an exhibitor's non-acceptance, the Board's order is suspended.[17]

It seems obvious that this procedure complies with the standards established in *Freedman*, with the only possible objection being the length of time necessary to get a final adjudication on the merits. The ordinance provides for the Board's joinder in any motion to advance the case on the court docket and for numerous other devices to expedite the proceedings; but, of course, the City of Dallas cannot compel the state courts to afford the speedy relief requested.[18] Judge Hughes found, however, that the Texas courts made it a practice to advance cases involving the public welfare and that final judgment could be obtained from the Texas Supreme Court in less than thirty-five days.[19] The exhibitors here offered evidence that before the classification cases the City of Dallas had not been able to get the Court of Civil Appeals to hear an appeal in less than sixty-one-days. However, in recent classification cases arising under the Dallas ordinance, that Court has advanced the cases on its docket and, in one case, heard an appeal six days after the

[17] See Appendix, §§ 46A-3, 46A-7.

[18] Cf. Trans-Lux Dist. Corp. v. Maryland State Board of Censors, Md. Ct. App. 1965, 213 A. 2d, 235, 237-38 (State statute requiring courts to provide speedy review).

[19] Judge Hughes found the provisions for judicial review in the first Dallas Classification ordinance insufficient under *Freedman*, but that ordinance did not contain provisions for waiver of statutory notice, filing of reply briefs within a short period or joinder in motions to advance. *Interstate Circuit, Inc. v. City of Dallas*, N.D. Tex. 1965, 247 F. Supp. 906, 911, 916.

filing of the motion to advance.[19a] So long as the courts are willing to cooperate in this manner, *Freedman's* requirement for speedy judicial action on the merits and on review are satisfied.

The intervening distributors complain that the ordinance does not contain provisions to insure them adequate procedural safeguards. *Freedman*, however, does not require consideration of the distributor in censorship proceedings. It also would appear that the interests of the exhibitor and the distributor in a particular local are sufficiently similar and that the working relationship between them is sufficiently close to give adequate protection to the distributors.[19b]

V.

The exhibitors argue that Article 527 of the Texas Penal code pre-empts the field of regulating motion pictures. Although Article 527 does apply to obscene motion pictures, it specifically excludes the type of commercial films which the classification ordinance seeks to regulate.[20] A similar argument was rejected by the Texas Court of Civil Appeals in *Janus Films, Inc. v. City of Fort Worth*, Tex. Civ. App. 1962, 354 S.W. 2d 597, 599. Writ of error was refused (no

[19a] See discussion in *Interstate Circuit, Inc. v. City of Dallas*, Tex. Civ. App. 1966, 402 S.W. 2d 770, 774. (Writ ref. n.r.e.)

[19b] See discussion in *Interstate Circuit, Inc. v. City of Dallas*, Tex. Civ. App. 1966, 402 S.W. 2d 770, 776 (writ ref. n.r.e.)

[20] Section 5 of Article 527 contains the following language:

"The provisions of this Act shall not apply to any motion pictures produced or manufactured as commercial motion pictures which (1) have the seal under the Production Code of the Motion Picture Association of America, Inc.; or (2) legally move in interstate commerce under Federal Law; or (3) are legally imported from foreign countries into the United States and have been passed by a Customs Office of the United States Government at any port of entry."

reversible error) by the Texas Supreme Court in a per curiam opinion which noted that appellate review of the trial court's granting or denying of a temporary injunction is limited to the question of abuse of discretion and that the Court of Civil Appeals should not have gone into the merits of the case. 358 S.W. 2d 589.

In *Chemline, Inc. v. City of Grand Prairie*, 5th Cir. 1966, ... F. 2d ..... (No. 22254, July 6, 1966), this Court recently concluded that the Court of Civil Appeals' decision in *Janus Films*, although "not very convincing" in light of the Texas Supreme Court's opinion, controlled the determination of the question under the *Erie* doctrine. Because of the nature of the precedent established by *Janus Films*, this Court issued the mandate but granted the defendant permission to file a delayed application for rehearing if a Texas appellate decision were subsequently rendered authoritatively contrary to the Court of Civil Appeals' decision in *Janus Films*.

Janus Films, however, is no longer the only Texas authority dealing with Article 527. The Texas Supreme Court has recently refused writ of error (no reversible error) in *Interstate Circuit, Inc. v. City of Dallas*, Tex. Civ. App. 1966, 402 S.W. 2d 770, 776, where the Court of Civil Appeals summarily dismissed the exhibitor's argument that Article 527 pre-empted the field of movie regulation. In view of this additional development in Texas law, we conclude that no provision for delayed application for rehearing need be granted as this Court did in *Chemline, Inc. v. City of Grand Prairie*.

We have considered the remaining contentions of the parties and find them without merit. The judgment of the District Court is

AFFIRMED.

JUDGE WILLIAM HAROLD COX DISSENTS.

Ordinance 11284 quoted in appendix A of this petition is included in the opinion. It is omitted here.

COX,* United States District Judge, dissenting:

Impelled to the conclusion that Dallas Ordinance No. 11284 on its face violates the First Amendment Rights of these motion picture exhibitors, I would reverse the decision of the trial court on direct and cross appeal; and respectfully dissent from the majority to the contrary.

It is no longer debatable that motion pictures enjoy the protection of free speech under the First Amendment to the Constitution of the United States. *Nico Jacobellis v. State of Ohio*, 378 US 184, 84 S. Ct. 1676, says: "Motion pictures are within the ambit of the constitutional guarantee of freedom of speech and of the press. *Joseph Burstyn, Inc. v. Wilson*, 343 US 495, 72 S. Ct. 277, 96 L. Ed. 1098. But in *Roth v. U.S.* and *Alberts v. California*, 354 US 476, 77 S. Ct. 1304, 1 L. Ed. 1498, we held that obscenity is not subject to those guarantees."[1]

It has not been intimated in any authoritative decision that such vested First Amendment Rights may be dissipated by anything short of obscenity in such material as that term is defined by several decisions of the Supreme Court of the United States. It is not sufficient that a motion picture be objectionable or even odious and obnoxious in part, but the picture must be utterly without redeeming social value. The standard must be that of an average person, not on a com-

* William Harold Cox, United States District Judge for the Southern District of Mississippi, sitting by designation.

[1] The Court while considering a motion picture film for its fitness to be displayed in the Jacobellis case, supra, declined to abnegate its duty to protect First Amendment Rights, saying:

> "Since it is only obscenity that is excluded from the Constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of Constitutional law," citing Roth.

munity or state basis, but on a national basis in measuring First Amendment Rights under the Constitution of the United States. *Jacobellis, supra,* says: "That the constitutional status of an allegedly obscene work must be determined on the basis of a national standard. It is, after all, a national constitution we are expounding."

But this Dallas ordinance says nothing about obscenity, and the trial judge gave it a helpful nudge in that direction to provide the basis for the cross appeal here. But the Court could not by its proviso give, or ascribe to the ordinance something not said or to be found therein.

There is, indeed, sound basis in dicta found in many respected cases to the effect that states may take a critical look at pictures designed for viewing by young people under sixteen years of age, in the instant case; and that they may supervise such showings to see that these young minds are not polluted by any filth which is utterly without any redeeming social value or importance as determined by an average person on a national basis. That is the basic teaching of the landmark decision of *Roth v. United States,* 354 US 476, 77 S. Ct. 1304. That decision has been amplified and explained and broaden, but never retrograded. The Roth standards were so applied to an indictment under the Federal Obscenity Statute (18 U.S.C.§1461) in *Ralph Ginzburg v. United States,* ..... US ....., 86 S. Ct. 942, and in *Edward Mishkin v. State of New York,* ..... US ....., 86 S. Ct. 958, involving the New York Obscenity Statute appearing as §1141 New York Penal Code. Finally, the Supreme Court of the United States epitomizing its *Roth* decision in *A Book*

Named John Cleland's Memoirs of a Woman of Pleasure v. Attorney General of the Commonwealth of Massachusetts, ... US ....., 86 S. Ct. 975.

This ordinance is assailed on the ground that it does not contain necessary standards and indispensable guides to vouchsafe the adequate protection of these First Amendment Rights of these exhibitors; that it is vulnerable to the vagueness doctrine and does not have built into the ordinance itself any safeguard against devastating delays and chilling expense of litigation. The trial court again detected and valiantly tried to remedy this last mentioned infirmity by judicial fiat, but to no avail. There is nothing in this ordinance or the record to support the Court's optimism in finding that any litigation under this ordinance could be concluded in thirty-five days.[2]

These prior restraints upon free speech surely come before the Court bearing a heavy presumption against its Constitutional validity. It is noteworthy that not one of this nine member board need be a lawyer versed in detecting and deciding upon any of the niceties of the protected vested right of free speech. The dangers of a censor system of any kind and its vices are recountered in *Ronald L. Freedman v. State of Maryland*, 380 US 51, 85 S. Ct. 734, where it is said: "To this end, the exhibitor must be assured, by statute

[2] With no intervening change in any fact or circumstance, in *Interstate Circuit, Inc. v. City of Dallas* on November 9, 1965, 247 F. Supp. 906, 911, the Court said: "There being no provision in the Texas statutes for prompt judicial review in the trial and appellate courts, and experience being that risk of delay is built into the Texas procedure, the Ordinance in question lacks sufficient procedural safeguards designed to obviate the dangers of a censorship system."

or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film. Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. Moreover, we are well aware that, even after expiration of a temporary restraint, an administrative refusal to license, signifying the censor's view that the film is unprotected, may have a discouraging effect on the exhibitor. See *Bantam Books, Inc. v. Sullivan, supra.* Therefore, the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license."

It may not be doubted that this ordinance is in reality one of limited censorship, though it is called a classification ordinance. Any such kind of censorship apparatus is said to be always fraught with danger and viewed with suspicion of its constitutional invalidity. Standards for testing and safeguards against expensive and extended litigation must be built into the ordinance to safeguard against the ultimate and effectual destruction of First Amendment Rights. *Ronald L. Freedman v. State of Maryland, supra:* "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." The operation of this ordinance must envision the existence of a strong presumption that the film contains protected free speech material and that the burden rests upon the board to overcome it. That is the rule applicable to the

non-criminal aspect of this ordinance but it also has a criminal aspect. The *Freedman* case suggests some provisions for a statute to avoid chilling these protected rights of an exhibitor.

The municipality in this case undertook to unilaterally control the course of subsequent litigation, but the municipality is subject to the state statutes and rules of Court for disposition of cases and a timetable of litigation is not committed to the control of Dallas. The ordinance is thus lacking in its protection of a valuable right of due process. Two of the present Supreme Court Justices would not even approve such an ordinance, if it complied with the Freedman rule, but would insist upon literal respect for these First Amendment Rights and deny all paralyzing power to the censor. The attempts of the municipality to comply with this requirement are largely precatory in nature.

An analysis of §46A-1(f) of this ordinance must be made for an understanding of the classification "not suitable for young persons." That is the heart of this ordinance. It was this provision which the trial court propped up by relating it to obscenity. There is thus submitted to an administrative board for its impressions and reactions, the examination of a film for their determination as to whether or not it is fit for exhibition to young persons under sixteen years of age. This ordinance says nothing about obscenity, but irrefragably invades that field under a different cloak—not as a censor, but as a classifier with the same power and effect. The Supreme Court says that obscene material finds no protection under the First Amendment and has indicated a modified

standard for determination of obscenity where young persons are involved. In *A Book Named John Cleland's Memoirs of a Woman of Pleasure v. Attorney General of the Commonwealth of Massachusetts,* ..... US ....., 86 S. Ct. 975, "We defined obscenity in Roth in the following terms: "Whether to the average persons, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.' 354 U.S., at 489, 77 S. Ct., at 1311. Under this definition, as elaborated in subsequent cases, three elements must coalesce: It must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

Section 46A-1 (Definitions) makes no provision for application of any given standards of morality or guides to be used and employed by the board in making its impressions and determinations as to the fitness of the particular film for exhibition. Thus, without any instructions on the subject of First Amendment Rights, this board is set adrift among myriad shoals for the laudable purpose of protecting its young people from shows that they should not see and hear for their best interest. Yet, there are no procedural safeguards in this Dallas ordinance to safeguard and protect and vouchsafe to the exhibitor their First Amendment Rights. We are told that Dallas is even now enforcing this ordinance as written.

Finally, §2 of this ordinance provides: "That any person who shall violate any provisiom (sic) of this ordinance shall be guilty of a misdemeanor" and upon conviction shall be fined two hundred dollars for each offense. It may be safely doubted that the average person could understand exactly that which is proscribed by this ordinance to avoid criminal punishment. While §46A-4 is captioned "Offenses," this section is not all comprehensive of that which seems to be prohibited by this criminal provision. It may be well doubted that this ordinance thus conveys sufficiently definite warning as to the proscribed criminal conduct to define a valid criminal offense. It seems to follow as a matter of course that this ordinance is surely vulnerable to the Vagueness Doctrine as presently applied. It impinges upon the protected rights of motion picture exhibitors under the First Amendment as implemented by the Fourteenth Amendment to the Constitution of the United States.

With reluctance, I respectfully DISSENT for the reasons indicated.

United States Court of Appeals
FOR THE FIFTH CIRCUIT

October Term, 1965

No. 23306

D. C. Docket No. CA 3-1303

INTERSTATE CIRCUIT, INC., et al.,
Appellants-Appellees,

v.

CITY OF DALLAS,
Appellee-Appellant.

(AND REVERSE TITLE)

Appeals from the United States District Court for the Northern District of Texas.

Before WISDOM and THORNBERRY, Circuit Judges, and Cox,* District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants-appellees, Interstate Circuit, Inc., and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

August 30, 1966

COX,* U. S. District Judge, dissents.

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* William Harold Cox, U. S. District Judge for the Southern District of Mississippi, sitting by designation.
Issued as Mandate: Oct. 26, 1966.

B-51-b

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 23306

INTERSTATE CIRCUIT, INC., et al.,

Appellants,

v.

CITY OF DALLAS,
(AND REVERSE TITLE)

Appellee.

Appeal from the United States District Court for the Northern District of Texas

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(October 18, 1966)

ON PETITION FOR REHEARING AND MOTION TO ENLARGE RECORD

Before WISDOM and THORNBERRY, Circuit Judges, and Cox,* District Judge.

PER CURIAM:

It is ORDERED that the motions filed by appellants and distributors for rehearing and enlargement of the record in the above styled and numbered cause be, and the same are, hereby DENIED.

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* William Harold Cox, United States District Judge for the Southern District of Mississippi, sitting by designation.

B-52

INTERSTATE CIRCUIT, INC., et al.,

Plaintiff,

v.

CITY OF DALLAS,

Defendant.

Civ. A. No. CA 3-1006.

United State District Court
N. D. Texas,
Dallas Division.

Nov. 9, 1965.

Injunction case. The District Court, Hughes, J., held, inter alia, that classification of motion pictures as to suitability for young persons under prescribed standards is reasonable and not in contravention of First Amendment, but held that Dallas ordinance provision for revocation or suspension of exhibitor's license was null and void for denial of exhibitor's right to show nonobscene motion pictures and for lack of sufficient procedural safeguards.

Order accordingly.

1. Municipal Corporations

Powers of Dallas are plenary, subject to limitation that its charter and ordinances shall contain nothing inconsistent with State or Federal Constitution or general laws enacted by legislature. Vernon's Ann.St.Const. art. 11, § 5.

2. Municipal Corporations

Penal Code article, prohibiting obscene pictures but excluding from its provisions pictures having certain seal, legally moving in interstate commerce or legally imported, leaves field of regulation of excluding pictures to City of Dallas and delegates to city power to regulate such pictures. Vernon's Ann.St.Const. art. 11, § 5; Vernon's Ann.P.C. art. 527.

3. Theaters and Shows

Power given to Dallas board to classify films on basis of suitability for young persons is reasonable in order to prevent incitement or encouragement of crime, delinquency, or sexual promiscuity on part of young persons.

4. Constitutional Law

It is not function of court to debate wisdom of legislative determination where conclusion of legislative body is not wholly unreasonable.

5. Municipal Corporations

Theaters and Shows

Dallas city council's inference from data before it that certain films have tendency to incite or encourage criminal, delinquent and sexually promiscuous behavior on part of young people was not so unreasonable and arbitrary as to be invalid, and it was function of court to accept such legislative judgment as valid.

6. Municipal Corporations

An enactment aimed at combating criminal, delinquent and sexually promiscuous behavior on part of young persons is within power of Dallas city council if it does not transgress boundaries fixed by Constitution for freedom of expression.

7. Constitutional Law

States' authority over children's activities is broader than over like activities of adults, and films which to an audience of young persons are obscene when presented in salacious manner are not protected by First Amendment to Federal Constitution. U.S.C.A.Const. Amend. 1.

8. Municipal Corporations

Action of city in enacting ordinance within its range of discretion cannot be set aside merely because compliance therewith would result in financial loss.

9. Constitutional Law

Dallas ordinance provision for suspension of classification board's order unless injunction was issued within 15 days after filing by exhibitor of notice of non-acceptance of board's classification of film as unsuitable for young persons was so vague and indefinite as to make exhibitor's right to speedy determination of issue uncertain, thus depriving him of due process of law. 28 U.S.C.A. § 1331; Vernon's Ann.St.Const. art. 11, § 5; Vernon's Ann.P.C. art. 527.

10. Theaters and Shows

Regardless of whether injunction provided for was temporary or permanent, Dallas ordinance authorizing classification of films as unsuitable for young persons lacked sufficient procedural safeguards in absence of provision in Texas statutes for prompt judicial review. U.S.C.A.Const. Amend. 1.

11. Theaters and Shows.

Dallas ordinance provisions for forfeiture and confiscation were null and void for failure to provide adequate protection for exhibition of nonobscene motion pictures to adult audience. U.S.C.A. Const. Amend. 1.

12. Constitutional Law

Dallas ordinance provision for revocation or suspension of exhibitor's license was null and void for denial of exhibitor's right to show nonobscene motion pictures as guaranteed by First Amendment to Federal Constitution. U.S.C.A.Const. Amend. 1.

13. Theaters and Shows

Requiring license from exhibitor prior to exhibition of films classified "not suitable for young persons" was within police power of city, but issuance of license and revocation and suspension of license were so inter-related with conviction of offense under ordinance as to make them unenforceable and invalid. 28 U:S.C.A. § 1331; Vernon's Ann.St.Const. art. 11, § 55; Vernon's Ann.P.C. art. 527.

14. Municipal Corporations

All of other provisions of Dallas ordinance, with exception of section defining terms and section establishing board to classify films on basis of suitability for young persons, were so inter-related and so dependent upon each other that invalidity of certain of ordinance sections would render such other provisions unenforceable.

Grover Hartt, Jr., Edwin Tobolowsky (Tobolowsky, Hartt, Schlinger & Blalock), Dallas, Tex., for plaintiffs.

N. Alex Bickley, City Atty., Ted P. MacMaster, Asst. City Atty., Dallas, Tex., for defendant.

HUGHES, District Judge.

This matter came on for hearing on the application of the Plaintiffs for a preliminary injunction and the parties by stipulation having agreed that this application would be considered for a permanent injunction, and the Court having considered the pleadings on file and having heard the evidence and argument of counsel, and having been fully advised in the premises of all particulars, does make and enter the following findings of fact and conclusions of law.

FINDINGS OF FACT

I.

Plaintiff, Interstate Circuit, Inc., is a Delaware corporation authorized to do business in Texas, with its principal place of business in Dallas, authorized to exhibit motion pictures. It operates the following theatres in the City of

Dallas: Majestic Theatre, 1925 Elm Street; Palace Theatre, 1623 Elm Street; Tower Theatre, 1905 Elm Street; Esquire Theatre, 3419 Oak Lawn; Inwood Theatre, Lovers Lane and Inwood Road; Circle Theatre, 2711 Storey Lane; Forest Theatre, 1918 Forest Avenue; Wilshire Theatre, Skillman and Mockingbird Lane; and Lakewood Theatre, 1825 Abrams Road.

Plaintiff Rowley United Theatres, Inc., is a Delaware corporation, authorized to do business in Texas, with its principal place of business in Dallas, authorized to exhibit motion pictures. It operates the following theatres in the City of Dallas: Jefferson Drive-In Theatre, 4506 West Jefferson; Town and Country Drive-In Theatre, Forest Lane and Plano Road; Lone Star Drive-In Theatre, 4600 Lawnview; Hampton Road Drive-In Theatre, 2833 South Hampton; Wynnewood Theatre, 275 Wynnewood Village; Vogue Theatre, 2010 West Jefferson; and Texas Theatre, 231 West Jefferson.

Plaintiff Big Tex Theatres, Inc., is a Texas corporation with its principal place of business in Dallas, authorized to exhibit motion pictures. It operates the following theatres in the City of Dallas: Granada Theatre, 3524 Greenville Avenue; Kiest Boulevard Drive-In Theatre; Crest Theatre, 2603 South Lancaster; and Avenue Theatre, 4923 Columbia.

Plaintiff Stanley Warner Texas, Inc., is a Delaware corporation authorized to do business in Texas with its principal place of business in Dallas and is authorized to exhibit motion pictures. It operates the following theatres in the City of Dallas: Chalk Hill Drive-In Theatre, 4501 West Davis; Buck-

ner Drive-In Theatre, 3311 North Buckner Boulevard; and Denton Road Drive-In Theatre, 11325 Harry Hines Boulevard.

Plaintiff Tivoli Realty, Inc., is a Texas corporation with its principal place of business in Dallas and is authorized to exhibit motion pictures. It operates the Delman Theatre, 3319 Raleigh Street.

Plaintiff Brooks Theatre, Inc., is a Texas corporation with its principal place of business in Dallas, Texas, and is authorized to exhibit motion pictures. It operates the South Loop Theatre, 3016 East Ledbetter Drive.

Plaintiff Trans-Texas Theatre, Inc., is a Texas corporation with its principal place of business in Dallas and is authorized to exhibit motion pictures. It operates the Capri Theatre, 1913 Elm Street.

Plaintiff Arcadia Theatre, Inc., is a Texas corporation with its principal place of business in Dallas and is authorized to exhibit motion pictures. It operates the Arcadia Theatre at 2005 Greenville Avenue.

Plaintiff Big "D" Theatre Company, Dallas, Texas, operates the Big "D" Drive-In Theatre, 6123 Harry Hines Boulevard.

Plaintiff Charles W. Weisenburg exhibits motion pictures in the City of Dallas. He operates the Kaufman Pike Drive-In Theatre, 7041 Second Avenue, City of Dallas.

Plaintiff Frank Lucchese, doing business as Llaw Enterprise Company, exhibits motion pictures. He operates State Theatre, 3217 Thomas Avenue, City of Dallas.

And Plaintiff General Cinema Corporation is a Delaware corporation authorized to do business in Texas. It operates the following theatres in the City of Dallas: Cinema North Park I, and Cinema North Park II.

II.

Defendant City of Dallas, is a home rule city. On April 5, 1965, Ordinance No. 10,963 was enacted in the form attached as Exhibit "A" hereto after the Council heard testimony on the subject.

III.

The Plaintiffs claim relief under the First and Fourteenth Amendments to the Constitution of the United States.

IV.

The Plaintiffs are engaged in the business of exhibiting commercial motion pictures in their respective theatres. In each theatre there is a large investment in personal property, projection equipment, and related accessories.

V.

Plaintiffs exhibit commercial talking motion pictures. These pictures are generally made in California, if of domestic manufacture, or they are made in foreign countries and imported through a port of entry of the United States Custom Office. The positive prints of said commercial motion pictures pass freely in interstate commerce in and out of the State of Texas. By the owners of the copyright of such motion pictures, the motion pictures are licensed for

exhibition to the respective Plaintiffs, at one or more theatres operated by the Plaintiffs according to the terms of a particular license agreement. At all times the copyright ownership and the title of the motion picture remains in the producer or the distributor, and none of the prints are owned by the Plaintiffs. They have no rights except by virtue of the license agreement mentioned above.

VI.

Approximately twenty per cent (20%) of the motion pictures released for initial exhibition by the Plaintiff, Interstate Circuit, Inc., are not available for a preliminary screening in the City of Dallas more than forty-five days prior to the opening date of the film. Of the other pictures which are released for first-run exhibition many of the screening prints have come to Dallas and move away from this distribution center so that the prints are not available for screening prior to exhibition except as a matter of chance or by prior arrangement.

VII.

At the time of a survey in August, 1965, Plaintiffs employed one hundred sixty nine (169) persons who were under eighteen years of age.

VIII.

The statutes of Texas and the Texas Rules of Civil Procedure, when applied to the Ordinance before the Court, do not provide for a speedy judicial review of the rights of

the Plaintiffs sufficient to satisfy the requirements of the case of Freedman v. State of Maryland, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965).

IX.

The Court finds that the language of Section 46A-10 of the Ordinance relating to forfeiture and confiscation fails to provide adequate protection to the Plaintiffs and therefore would be null and void under the First Amendment of the Constitution of the United States.

CONCLUSIONS OF LAW

I.

The Court has jurisdiction of the parties and the subject matter. 28 U.S.C. Sec. 1331.

II.

[1] The powers of the City of Dallas derive from Article 11, Section 5, of the Texas Constitution, Vernon's Ann. St., and are plenary, subject to the limitation that its charter and ordinances shall contain nothing inconsistent with the State or Federal Constitution or the general laws enacted by the Legislature. Janus Films, Inc. v. City of Fort Worth, 354 S.W. 2d 597, 599 (Tex. Civ. App.), writ of error refused per curiam, 163 Texas 616, 358 S.W. 2d 589 (1962).

III.

[2] Article 527 of the Vernon's Ann. Penal Code of the State of Texas prohibiting obscene pictures but excluding from its provisions motion pictures produced or manufac-

tured as commercial motion pictures which (1) have the seal under the production Code of the Motion Picture Association of America, Inc., or (2) legally move in interstate commerce under Federal Law, or (3) are legally imported from foreign countries into the United States and have passed the Customs Office of the United States Government at any port of entry, leaves the field of regulation of such pictures excluded from Article 527 to the City. Janus Films, Inc. v. City of Fort Worth, supra.

IV.

Since some motion pictures are excluded from Article 527 of the Penal Code of the State of Texas, as set out in the above conclusion, the power to regulate such pictures is delegated to the City of Dallas and are subject to regulation by the City. Janus Films, Inc. v. City of Fort Worth, supra.

V.

[3] Recognizing the legitimate and indeed exigent interest of the State and localities throughout the nation in the dissemination of material deemed harmful to children, the power given to the Dallas Motion Picture Classification Board established by Ordinance 10,963 of the City of Dallas to classify films (1) "suitable for young persons" or (2) "not suitable for young persons" is reasonable in order to prevent the incitement or encouragement of crime, delinquency, or sexual promiscuity on the part of young persons. Jacobellis v. State of Ohio, 378 U.S. 184, 195, 84 S. Ct.

1676, 12 L. Ed. 2d 793 (1964); In re Louisiana News Co. v. Dayries, 187 F. Supp. 241, 247-248 (E. D. La. 1960); State v. Settle, 90 R.I. 195, 156 A. 2d 921 (1959).

VI.

[4] It is not the function of the Court to debate the wisdom of a legislative determination that certain films can cause a moral deterioration in the young and a resultant tendency towards juvenile delinquency, where the conclusion of the legislative body is not wholly unreasonable. Williams v. Mayor and City Council of Baltimore, 289 U.S. 36, 42, 53 S. Ct. 431, 77 L. Ed. 1015 (1933).

VII.

[5] The legislative inference from available data before the City Council that certain films have a tendency to incite or encourage criminal, delinquent, and sexually promiscuous behavior on the part of young people is not so unreasonable and arbitrary as to be invalid, and such inference not being unreasonable, it is the function of the Court to accept the legislative judgment of the casual relationship between certain films and the societal evil as valid. Williams v. Mayor and City Council of Baltimore, supra.

VIII.

[6] An enactment aimed at combating criminal, delinquent and sexually promiscuous behavior on the part of young persons is plainly within the powers of the City Council, if it does not transgress the boundaries fixed by the Constitution for freedom of expression.

IX.

[7] The States' authority over children's activities is broader than over like activities of adults, and the fact that certain films are not obscene under the Supreme Court definition in Roth v. United States, 354 U.S. 476, 77 S. Ct. 1304, I L. Ed. 2d 1498, and affirmed in Jacobellis v. State of Ohio, 378 U.S. 184, 84 S. Ct. 1676, does not necessarily render them not obscene when viewed by an audience of young persons, as defined in Section 46A-1 of the Ordinance, so as to protect them under the First Amendment to the Federal Constitution. Jacobellis v. State of Ohio, 378 U.S. at 195, 84 S. Ct. 1676; Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 168, 64 S. Ct. 438, 88 L. Ed. 645 (1944); State v. Seattle, supra; In re Louisiana News Co. v. Dayries, supra. See Lockhart & McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5, 85-88 (1960); Fagan, Obscenity Control and Minors—The Case for a Separate Standard, 10 Catholic Lawyer 270 (1960); Note, "For Adults Only": The Constitutionality of Governmental Film Censorship by Age Classification, 69 Yale L.J. 141 (1959).

X.

Films which to an audience of young persons are obscene when presented in a salacious manner are not protected by the First Amendment to the Constitution. The itemization of films in the Ordinance involved herein, set out under the definition of "Not suitable for young persons" contained in Section 46A-1(f) (1) and (2) should be interpreted to include only those, which to an audience of young people

as defined in the Ordinance, are obscene when presented in a salacious manner. When so interpreted, such films are not protected by the First Amendment to the Constitution. See citations under IX.

XI.

[8] The subject of the Ordinance being within the police power of the City, its action in enacting said Ordinance within its range of discretion cannot be set aside merely because compliance would result in financial loss. See, e.g., Bowles v. Willingham, 321 U.S. 503, 517-518, 64 S. Ct. 641, 88 L. Ed. 892 (1944).

XII.

[9] Section 46A-7 entitled "Judicial Review" providing for the suspension of the Board's order unless an injunction is issued within fifteen days after the filing by an exhibitor of a notice of non-acceptance of the Board's classification is so vague and indefinite as to make the exhibitor's right to a speedy determination of the issue uncertain, thus depriving him of due process of law.

XIII.

[10] Regardless of whether the injunction provided for in Section 46A-7 of the Ordinance involved herein is interpreted as temporary or permanent, there being no provision in the Texas statutes for prompt judicial review in the trial and appellate courts, and experience being that risk of delay is built into the Texas procedure, the Ordinance in question

lacks sufficient procedural safeguards designed to obviate the dangers of a censorship system. Freedman v. State of Maryland, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965). Compare Trans-Lux Distributing Corp. v. Maryland State Board of Censors, 213 A. 2d 235 (Md. Sept. 27, 1965).

XIV.

[11] Section 46A-10 of the Ordinance, relating to forfeiture and confiscation of "any film used in connection with the commission of any act declared to be a public nuisance" is null and void due to its failure to provide adequate protection for the exhibition of non-obscene motion pictures to an adult audience as required by the First Amendment to the Constitution. See Near v. State of Minnesota ex. rel. Olson, 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931); Kingsley Books, Inc. v. Brown, 354 U.S. 436, 444-445, 77 S. Ct. 1325, 1 L. Ed. 2d 1469 (1957); Marcus v. Search Warrant, 367 U.S. 717, 81 S. Ct. 1708, 6 L. Ed. 2d 1127 (1961); A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 84 S. Ct. 1723, 12 L. Ed. 2d 809 (1964).

XV.

Since Section 46A-10 of the Ordinance relating to forfeiture and confiscation of "projection equipment used in connection with the commission of any act declared to be a public nuisance" denies the exhibitor the right to show any film, no matter how worthwhile or educational, to any audience at any time in the future without the purchase of new projection equipment, such provision is null and void for failure to provide adequate protection for the future ex-

hibition of non-obscene motion pictures, as required by the First Amendment to the Constitution. See citations under XIV.

XVI.

In view of the above conclusions, Section 46A-9 of the Ordinance is void and unenforceable because it violates the Plaintiff's rights guaranteed by the First Amendment of the Constitution of the United States.

XVII.

[12] Section 46A-6 of the Ordinance, relating to revocation or suspension of the exhibitor's license up to one year, is null and void due to its denial of the exhibitor's right to show non-obscene motion pictures as guaranteed by the First Amendment to the Constitution.

XVIII.

[13] The power of the City of Dallas to require a license from the exhibitor prior to the exhibition of films classified "not suitable for young persons" is within the police power of the City, but the issuance of the license under Section 46A-5 and the revocation and suspension of a license under Section 46A-6 of the Ordinance are so inter-related with the conviction of an offense under the Ordinance as to make them unenforceable and invalid.

XIX.

[14] All other provisions of Ordinance 10,963 with the exception of Sections 46A-1 and 46A-2 are so inter-related

and so dependent upon each other and with Sections 46A-6, 46A-7, 46A-9, and 46A-10 that they must be held unenforceable.

APPENDIX A

ORDINANCE NO. 10963

An Ordinance Providing for the Amendment of Chapter 46 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas by Adding Thereto a New Chapter known as Chapter 46A; Providing for the Establishment of a Motion Picture Classification Board; Outlining Classification Procedures; Defining Offenses Related to the Exhibition of Films Classified "Not Suitable for Young Persons"; Providing for the Issuance, Revocation and Suspension of Licenses; Providing for Judicial Review; Defining Public Nuisances; Providing for Injunctive Relief, Seizure of Film and Equipment; Providing for an Exception to State Laws; Providing for a Severability Clause; Providing for a Penalty and Declaring an Emergency.

WHEREAS, THE CITY COUNCIL OF THE CITY OF DALLAS, after making an investigation and hearing evidence presented at a Public Hearing, finds that there has been a serious increase in crime, delinquency and sexual promiscuity on the part of young persons of school age within the City, that such increase is the result of various factors, including the type of commercial entertainment available to such young persons, that among various entertainment media, motion picture films possess a greater capacity for good and for evil among young persons of school

age than most other modes of expression and are, therefore, affected with a public interest, that some of the films currently being shown and accessible to viewing by such young persons, though not obscene to such an extent as to justify complete suppression, nevertheless have a tendency to incite or encourage criminal, delinquent and sexually promiscuous behavior on the part of such young persons, and that an urgent public necessity exists to protect such young persons from the exhibition of such films:

Now, Therefore,

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF DALLAS:

SECTION 1. That the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas, be, and it is hereby amended by adding thereto a new chapter known as Chapter 46A, consisting of Sections 46A-1 through 46A-14.

CHAPTER 46A

MOTION PICTURE CLASSIFICATION ORDINANCE

§ 46A-1 Definition of Terms
§ 46A-2 Establishment of Classification Board
§ 46A-3 Classification Procedure
§ 46A-4 Offenses
§ 46A-5 License
§ 46A-6 Revocation or suspension of license
§ 46A-7 Judicial Review
§ 46A-8 Public Nuisances
§ 46A-9 Injunctions

§ 46A-10 Seizure of film and equipment
§ 46A-11 Exception to State Law
§ 46A-12 Severability Clause
§ 46A-13 Penalty
§ 46A-14 Emergency Clause

SECTION 46A-1 *Definition of Terms:*

(a) "Film" means any motion picture film or series of films, whether full length or short subject, but does not include newsreels protraying actual current events or pictorial news of the day.

(b) "Exhibit" means to project a film at any motion picture theatre or other public place within the City of Dallas to which tickets are sold for admission.

(c) "Exhibitor" means any person, film or corporation which exhibits a film.

(d) "Young person" means any person who has not attained his eighteenth birthday.

(e) "Board" means the Dallas Motion Picture Classification Board established by Section 46A-2 of this ordinance.

(f) "Not suitable for young persons" means:

(1) describing or portraying brutality, criminal violence or depravity in such a manner as to be, in the judgment of the Board, likely to incite or encourage crime or delinquency on the part of young persons; or

(2) describing or portraying nudity beyond the customary limits of candor in the community, or sexual promiscuity or extra-marital or abnormal sexual rela-

tions in such a manner as to be, in the judgment of the Board, likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest.

A film shall be considered "likely to incite or encourage" crime, delinquency or sexual promiscuity on the part of young persons, if, in the judgment of the Board, there is a substantial probability that it will create the impression on young persons that such conduct is profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted. A film shall be considered as appealing to "prurient interest" of young persons, if in the judgment of the Board, its calculated or dominant effect on young persons is substantially to arouse sexual desire. In determining whether a film is "not suitable for young persons", the Board shall consider the film as a whole, rather than isolated portions, and shall determine whether its harmful effects outweigh whatever artistic or educational values such film may have for young persons.

(g) "Classify" means to determine whether a film is:

(1) Suitable for young persons, or;

(2) not suitable for young persons

(h) "Advertisement" means any commercial promotional material initiated by an exhibitor designed to bring a film to public attention or to increase the sale of tickets to exhibitions of same, whether by newspaper, billboard, motion picture, television, radio, or other media within or originating within the City of Dallas.

(i) "Initial exhibition" means the first exhibition of any film within the City of Dallas.

(j) "Subsequent exhibition" means any exhibition subsequent to the initial exhibition, whether by the same or a different exhibitor.

(k) "File" means to deliver to the City Secretary for safekeeping as a public record of the City of Dallas.

(l) "Classification order" means any written determination by a majority of the Board classifying a film, or granting or refusing an application for change of classification.

SECTION 46A-2 *Establishment of Board:*

There is hereby established a body to be known as the Dallas Motion Picture Classification Board which shall be composed of a Chairman and Eight Members to be appointed by the Mayor and City Council of the City of Dallas, whose terms shall be the same as members of the City Council. Such members shall serve without pay and shall adopt such rules and regulations as they deem best governing their action, proceeding and deliberations and time and place of meeting. If a vacancy occurs upon the Board by death, resignation or otherwise, the governing body of the City of Dallas shall appoint a member to fill such vacancy for the unexpired time.

The Chairman and all Members of the Board shall be good, moral, law abiding citizens of the City of Dallas, and shall be chosen so far as reasonably practicable in such a manner that they will represent a cross section of the community. Insofar as practicable, the members appointed to the Board shall be persons educated and experienced in

one or more of the following fields: Art, Drama, Literature, Philosophy, Sociology, Psychology, History, Education, Music, Science or other related fields. The City Secretary shall act as Secretary of the Board.

SECTION 46A-3 *Classification procedure:*

(a) Before any initial exhibition, the exhibitor shall file a proposed classification of the film to be exhibited, stating the title of the film and the name of the producer, and giving a summary of the plot and such other information as the Board may by rule require, together with the classification proposed by the exhibitor. The Board shall examine such proposed classification, and if it approves same, shall mark it "approved" and file it as its own classification order. If the Board fails to act, that is, either file a classification order or call a hearing within ten days after such proposed classification is filed, the proposed classification shall be considered approved.

(b) If upon examination of the proposed classification a majority of the Board is not satisfied that it is proper, the Chairman shall direct the exhibitor to project the film before any five or more members of the Board, at a suitably equipped place and at a specified time, which shall be the earliest time practicable with due regard to the availability of the film. The exhibitor, or his designated representative, may at such time make such statement to the Board in support of his proposed classification and present such testimony as he may desire. Within two days, the Board shall make and file its classification of the film in question.

(c) Any initial or subsequent exhibitor or any five adult citizens of the City of Dallas may file an application for a

change in the classification of any film previously classified. No exhibitor shall be allowed to file more than one application for change of classification of the same film. Such application shall contain a sworn statement of the grounds for such change. Upon filing of such application, the City Secretary shall bring it immediately to the attention of the Chairman of the Board, who upon application by the exhibitor shall, but upon application of five adult citizens only after concurrence by four members of the Board, set a time and place for a hearing and shall notify the applicants and all interested parties, including all exhibitors who may be exhibiting or preparing to exhibit the film. The Board shall view the film and at such hearing hear the statements of all interested parties, and any proper testimony that may be offered, and shall promptly make and file its order granting or refusing such application.

(d) Upon filing by the Board of any classification order, the City Secretary shall immediately issue and mail a notice of classification to the exhibitor involved and to any other exhibitor who shall request such notice.

(e) A classification shall be binding on any subsequent exhibitor unless and until he obtains a change of classification in the manner above provided.

SECTION 46A-4 *Offenses:*

(a) It shall be unlawful for any exhibitor or his employee:

(1) To exhibit any film which has not been classified as provided in this ordinance.

(2) To exhibit any film classified "not suitable for young persons" if any current advertisement of such film by such exhibitor fails to state clearly the classification of such film.

(3) To exhibit any film classified "not suitable for young persons" without keeping such classification posted prominently in front of the theater in which such film is being exhibited.

(4) Knowingly to sell or give to any young person a ticket to any film classified "not suitable for young persons."

(5) Knowingly to permit any young person to view the exhibition of any film classified "not suitable for young persons."

(6) To exhibit any film classified "not suitable for young persons" or any scene or scenes from such a film, or from an unclassified film, whether moving or still, in the same theater and on the same program with a film classified "suitable for young persons"; provided that any advertising preview or trailer containing a scene or scenes from an unclassified film or a film classified "not suitable for young persons" may be shown at any time if same has been separately classified as "suitable for young persons" under the provisions of Section 46A-3 of this ordinance.

(7) To make any false or willfully misleading statement in any proposed classification, application for change of classification, or any other proceeding before the Board.

(8) To exhibit any film classified "not suitable for young persons" without having in force the license hereinafter provided.

(b) It shall be unlawful for any young person:

(1) To give his age falsely as eighteen years of age or over, for the purpose of gaining admittance to an exhibition of a film classified "not suitable for young persons."

(2) To enter or remain in the viewing room of any theater where a film classified "not suitable for young persons" is being exhibited.

(3) To state falsely that he or she is married for the purpose of gaining admittance to an exhibition of a film classified as "not suitable for young persons."

(c) It shall be unlawful for any person other than those specified in Subdivisions (a) and (b) above:

(1) To sell or give to any young person a ticket to an exhibition of a film classified "not suitable for young persons."

(2) To make any false or willfully misleading statement in an application for change of classification or in any proceeding before the Board.

(3) To make any false statements for the purpose of enabling any young person to gain admittance to the exhibition of a film classified "not suitable for young persons."

(d) To the extent that any prosecution or other proceeding under this ordinance, involves the entering, purchasing of a ticket, or viewing by a young person of a film classified "not suitable for young persons", it shall be a valid defense that such young person was accompanied by his parent or legally appointed guardian, husband or wife, throughout the viewing of such film.

SECTION 46A-5 *License:*

Every exhibitor who has not been finally convicted of an offense under this ordinance shall be entitled to issuance by the City Secretary of a license to exhibit films classified "not suitable for young persons."

SECTION 46A-6 *Revocation or suspension of license:*

Whenever the City Attorney or any person acting under his direction, or any ten citizens of the City of Dallas, shall file a sworn complaint with the City Secretary stating that any exhibitor has repeatedly violated the provisions of this ordinance, or that any exhibitor has persistently failed to use reasonable diligence to determine whether those seeking admittance to the exhibition of a film classified "not suitable for young persons" are below the age of eighteen, the City Secretary shall immediately bring such complaint to the attention of the Chairman of the Board who shall set a time and place for hearing such complaint and cause notice of such hearing to be given to the complainants and to the exhibitor involved. Upon such hearing the Chairman shall have authority to issue subpoenas requiring witnesses to appear and testify at such hearing, and any party to such hearing shall be entitled to such process. If, after hearing the evidence, the Board shall find the charges in such complaint to be true, the Board shall issue and file an order revoking or suspending the license above provided for a specific period not to exceed one year, or may issue a reprimand if it is satisfied that such violation will not continue.

The Board likewise, after notice and hearing, may revoke or suspend the license of any exhibitor who has refused or unreasonably failed or delayed the submission of a film for review, when requested by the Board.

SECTION 46A-7 *Judicial Review:*

(a) Within two days after the filing of any classification order by the Board, other than an order approving the

classification proposed by an exhibitor, any exhibitor may file a notice of nonacceptance of the Board's classification, stating his intention to exhibit the film in question under a different classification. Thereupon, it shall be the duty of the Board to make prompt application to a Court of competent jurisdiction for an injunction restraining such exhibitor from exhibiting the film in question contrary to the provisions of this ordinance. If such exhibitor appears at any hearing on such application, and opposes such injunction, the Board shall have the burden to present evidence sufficient to convince the court of the reasonableness of its classification.

(b) The filing of such notice of non-acceptance shall not suspend or set aside the Board's order, but such order shall be suspended at the end of fifteen days after the filing of such notice unless an injunction is issued within such period.

(c) Failure of any exhibitor to file the notice of nonacceptance within two days as required in Subdivision (1) of this Section 7, shall constitute acceptance of such classification order and such exhibitor shall be bound by such order in all subsequent proceedings except such proceedings as may be had in connection with any application for change of classification under Subdivision (c) of Section 46A-3 above.

SECTION 46A-8 *Public nuisances:*

The following acts are declared to be public nuisances:

(a) Any violation of Subdivisions (1), (2), (3), (6) or (7) of Subdivision (a) of Section 46A-4 of this ordinance.

(b) Any exhibition of a film classified a "not suitable for young persons" at which more than three young persons are admitted.

(c) Any exhibition of a film classified as "not suitable for young persons" by an exhibitor who fails to use reasonable diligence to determine whether persons admitted to such exhibition are persons under the age of eighteen years.

(d) Any exhibition of a film classified as "not suitable for young persons" by an exhibitor who has been convicted of as many as three violations of Subdivisions (4) or (5) of Subdivision (a) of Section 46A-4 of this ordinance in connection with the exhibition of the same film.

SECTION 46A-9 *Injunctions:*

Whenever the Board has probable cause to believe that any exhibitor has committed any of the acts declared in Section 8 above to be a public nuisance, the Board shall have the duty to make application to a Court of competent jurisdiction for an injunction restraining the commission of such acts.

SECTION 46A-10 *Seizure of Film and Equipment:*

Any film or projection equipment used in connection with the commission of any act declared to be a public nuisance in Section 9 above may be seized and held by the Chief of Police and may be forfeited or confiscated upon suit brought for that purpose by the City in any Court of competent jurisdiction.

SECTION 46A-11 *Exception to State Law:*

Nothing in this ordinance shall be construed to regulate public exhibitions preempted by Article 527 of the Penal Code of the State of Texas, as amended.

SECTION 46A-12 *Severability Clause:*

Should any section, subsection, sentence, provision, clause or phrase be held to be invalid for any reason, such holding shall not render invalid any other section, subsection, sentence, provision, clause or phrase of this ordinance, and same are deemed severable for this purpose.

SECTION 46A-13 *Penalty:*

That any person who shall violate any provisions of this ordinance shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine not to exceed Two Hundred Dollars ($200.00) and each offense shall be deemed to be a separate violation and punishable as a separate offense.

SECTION 46A-14 *Emergency Clause:*

The fact that there are no ordinances in the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas providing for the classification of motion pictures, creates an urgency and an emergency in the preservation of the public peace, comfort and general welfare and requires that this ordinance shall take effect immediately from and after its passage, and it is accordingly so ordained.

APPROVED AS TO FORM:
H. P. KUNCERA, CITY ATTORNEY

By N. Alex Bickley
Assistant City Attorney

PASSED: April 5, 1965
CORRECTLY ENROLLED: April 5, 1965

ATTEST:

HAROLD G. SHANK
City Secretary

H. P. KUCERA
City Attorney

STATE OF TEXAS
COUNTY OF DALLAS
CITY OF DALLAS

I, Harold G. Shank, City Secretary of the City of Dallas, Texas do hereby certify that the above and foregoing is a true and correct copy of Ordinance (passed) by the City Council of the City of Dallas, Texas, April 5, 1965 WITNESS MY HAND AND THE SEAL OF THE CITY OF DALLAS, TEXAS, This the 26 day of Nov. A.D. 1965.

HAROLD G. SHANK
City Secretary of the
City of Dallas, Texas

B-82

380 U.S. 51

RONALD L. FREEDMAN,

Appellant,

v.

STATE OF MARYLAND.

No. 69.

Argued Nov. 19, 1964.

Decided March 1, 1965.

Defendant was convicted, in the Criminal Court of Baltimore of publicly exhibiting a film not submitted to board of censors. The Court of Appeals affirmed, 197 A. 2d 232, 233 Md. 498, and defendant appealed. The Supreme Court, Mr. Justice Brennan, held that procedural scheme of Maryland motion picture censorship statute failed to provide adequate safeguards against undue inhibition of protected expression since (1) if censor disapproved film, exhibitor was required to assume burden of instituting judicial proceedings and persuading court that film was protected expression, (2) once board had acted against film, exhibition thereof was prohibited pending judicial review, however protracted, and (3) statute provided no assurance of prompt judicial determination.

Reversed.

1. *Constitution Law*

Prior restraint is not necessarily unconstitutional under all circumstances. U.S.C.A. Const. Amends. 1, 14.

2. *Constitutional Law*

One has standing to challenge statute, on ground that it delegates overly broad licensing discretion to administrative office in area of freedom of expression, whether or not challenger's conduct could be proscribed by properly drawn statute and whether or not he has applied for license.

3. *Constitutional Law*

Standing of one who might have had license for asking to call into question whole scheme of licensing when he is prosecuted for failure to procure license is recognized because of danger of tolerating, in area of First Amendment freedoms, existence of penal statutes susceptible of sweeping and improper application.

4. *Constitutional Law*

Apparatus of censorship is always fraught with danger and is viewed with suspicion. U.S.C.A. Const. Amends. 1, 14.

5. *Constitutional Law*

Even though defendant's refusal to submit film to board was violation of only one section of censorship statute, he had standing to challenge other provisions where, in substance, his argument was that, because censorship apparatus operated in statutory context in which judicial review could be too little and too late, statute lacked sufficient safeguards for confining censor's action to judicially determined constitutional limits and, therefore, contained same vice as statute delegating excessive administration discretion.

6. *Constitutional Law*

It is true of motion pictures, as well as other forms of expression, that any system of prior restraint comes to court bearing heavy presumption against its constitutional validity. U.S.C.A. Const. Amends. 1, 14.

7. *Constitutional Law*

A noncriminal process which requires prior submission of film to censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate dangers of censorship system.

8. *Constitutional Law*

For noncriminal process which requires prior submission of film to censor to avoid constitutional infirmity, burden of proving that film is unprotected expression must rest on censor. U.S.C.A. Const. Amends. 1, 14.

9. *Constitutional Law*

State may require advance submission of all films, but in order to proceed effectively to bar all showings of unprotected films, requirement cannot be administered in manner which will lend effect of finality to censor's determination as to whether film constitutes protected expression.

10. *Constitutional Law*

Only judicial determination in adversary proceeding insures necessary sensitivity to freedom of expression and, therefore, only a procedure requiring judicial determination suffices to impose valid final restraint on freedom of expression.

11. *Constitutional Law*

For noncriminal process which requires prior submission of film to censor to avoid constitutional infirmity, exhibitor must be assured, by statute or authoritative judicial construction, that censor will, within specified brief period, either issue license or go to court to restrain showing of film. U.S.C.A. Const. Amends. 1, 14.

12. *Constitutional Law*

For noncriminal process which requires prior submission of film to censor to avoid constitutional infirmity, any restraint imposed in advance of judicial determination on merits must be limited to preservation of status quo for shortest fixed period compatible with sound judicial resolution. U.S.C.A. Const. Amends. 1, 14.

13. *Constitutional Law*

For noncriminal process which requires prior submission of film to censor to avoid constitutional infirmity, procedure must assure prompt final judicial decision, to minimize deterrent effect of interim and possibly erroneous denial of license.

14. *Constitutional Law*

Theaters and Shows

Procedural scheme of Maryland motion picture censorship statute failed to provide adequate safeguards against undue inhibition of protected expression where (1) if censor disapproved film, exhibitor was required to assume burden of instituting judicial proceedings and persuading court that

film was protected expression, (2) once board had acted against film, exhibition thereof was prohibited pending judicial review, however protracted, and (3) statute provided no assurance of prompt judicial determination. U.S.C.A. Const. Amends. 1, 14.

15. *Constitutional Law*

How, or whether, state was to incorporate required procedural safeguards into statutory scheme for censorship of motion pictures was for state to decide.

16. *Criminal Law*

It is common knowledge that films are scheduled well before actual exhibition.

Key

Felix J. Bilgrey, New York City, for appellant. [52]

Thomas B. Finan, Baltimore, Md., for appellee.

Mr. Justice BRENNAN delivered the opinion of the Court.

Appellant sought to challenge the constitutionality of the Maryland motion picture censorship statute, Md. Ann. Code, 1957, Art. 66A, and exhibited the film "Revenge at Daybreak" at his Baltimore theatre without first submitting the picture to the State Board of Censors as required by § 2 thereof.[1] The State concedes that the picture does not violate

[1] Md.Ann.Code, 1957, Art. 66A, § 2:

"It shall be unlawful to sell, lease, lend, exhibit or use any motion picture film or view in the State of Maryland unless the said film or view has been submitted by the exchange, owner or lessee of the film or view and duly approved and licensed by the Maryland State Board of Censors, hereinafter in this article called the Board."

the statutory standards[2] and [53] would have received a license if properly submitted, but the appellant was convicted of a § 2 violation despite his contention that the statute in its entirety unconstitutionally impaired freedom of expression. The Court of Appeals of Maryland affirmed, 233 Md. 498, 197 A. 2d 232, and we noted probable jurisdiction, 377 U.S. 987, 84 S. Ct. 1919, 12 L. Ed. 2d 1042. We reverse.

I.

[1] In Times Film Corp. v. City of Chicago, 365 U.S. 43, 81 S. Ct. 391, 5 L. Ed. 2d 403, we considered and upheld

[2] Md.Ann.Code, 1957, Art. 66A, § 6:

"(a) *Board to examine, approve or disapprove films.*—The Board shall examine or supervise the examination of all films or views to be exhibited or used in the State of Maryland and shall approve and license such films or views which are moral and proper, and shall disapprove such as are obscene, or such as tend, in the judgment of the Board, to debase or corrupt morals or incite to crimes. All films exclusively portraying current events or pictorial news of the day, commonly called news reels, may be exhibited without examination and no license or fees shall be required therefor.

"(b) *What films considered obscene.*—For the purposes of this article, a motion picture film or view shall be considered to be obscene if, when considered as a whole, its calculated purpose or dominant effect is substantially to arouse sexual desires, and if the probability of this effect is so great as to outweigh whatever other merits the film may possess.

"(c) *What films tend to debase or corrupt morals.*—For the purposes of this article, a motion picture film or view shall be considered to be of such a character that its exhibition would tend to debase or corrupt morals if its dominant purpose or effect is erotic or pornographic; or if it portrays acts of sexual immorality, lust or lewdness, or if it expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior.

"(d) *What films tend to incite to crime.*—For the purposes of this article, a motion picture film or view shall be considered of such a character that its exhibition would tend to incite to crime if the theme or the manner of its presentation presents the commission of criminal acts or contempt for law as constituting profitable, desirable, acceptable, respectable or commonly accepted behavior, or if it advocates or teaches the use of, or the methods of use of, narcotics or habit-forming drugs."

a requirement of submission of motion pictures in advance of exhibition. The Court of Appeals held, on the authority of that decision, that "the Maryland censorship law must be held to be not void on its face as violative of the freedoms protected against State action by the First and Fourteenth Amendments." 23 Md., at 505, 197 A. 2d, at 235. This reliance on Times Film was misplaced. The only question tendered for decision in that case was "whether a prior restraint was necessarily unconstitutional *under all circumstances*." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70, n. 10, [54] 83 S. Ct. 631, 639, 9 L. Ed. 2d 584 (emphasis in original). The exhibitor's argument that the requirement of submission without more amounted to a constitutionally prohibited prior restraint was interpreted by the Court in Times Film as a contention that the "constitutional protection includes complete and absolute freedom to exhibit, at least once, any and every kind of motion picture. * * * even if this film contains the basest type of pornography, or incitement to riot, or forceful overthrow of orderly government * * * ." 365 U.S., at 46, 47, 81 S. Ct., at 393. The Court held that on this "narrow" question, id., at 46, 81 S. Ct., at 393, the argument stated the principle against prior restraints too broadly; citing a number of our decisions, the Court quoted the statement from Near v. State of Minnesota, 283 U.S. 697, 716, 51 S. Ct. 625, 631, 75 L. Ed. 1357, that "[t]he protection even as to previous restraint is not absolutely unlimited." In rejecting the proffered proposition in Times Film the Court emphasized, however, that "[i]t is that question alone which we decide," 365 U.S., at 46, 81 S. Ct., at 393, and it would therefore be inaccurate

to say that Times Film upheld the specific features of the Chicago censorship ordinance.

Unlike the petitioner in Times Film, appellant does not argue that § 2 is unconstitutional simply because it may prevent even the first showing of a film whose exhibition may legitimately be the subject of an obscenity prosecution. He presents a question quite distinct from that passed on in Times Film; accepting the rule in Times Film, he argues that § 2 constitutes an invalid prior restraint because, in the context of the remainder of the statute, it presents a danger of unduly suppressing protected expression. He focuses particularly on the procedure for an initial decision by the censorship board, which, without any judicial participation, effectively bars exhibition of any disapproved film, unless and until the exhibitor undertakes a time-consuming appeal to the Maryland courts and succeeds in having the Board's decision [55] reversed. Under the statute, the exhibitor is required to submit the film to the Board for examination, but no time limit is imposed for completion of Board action, § 17. If the film is disapproved, or any elimination ordered, § 19 provides that

> "the person submitting such film or view for examination will receive immediate notice of such elimination or disapproval, and if appealed from, such film or view will be promptly reexamined, in the presence of such person, by two or more members of the Board, and the same finally approved or disapproved promptly after such re-examination, with the right of appeal from the decision of the Board to the Baltimore City Court of Baltimore City. There shall be a further right of appeal from the decision of the Baltimore City Court to

> the Court of Appeals of Maryland, subject generally to the time and manner provided for taking appeal to the Court of Appeals."

Thus there is no statutory provision for judicial participation in the procedure which bars a film, nor even assurance of prompt judicial review. Risk of delay is built into the Maryland procedure, as is borne out by experience; in the only reported case indicating the length of time required to complete an appeal, the initial judicial determination has taken four months and final vindication of the film on appellate review, six months. United Artists Corp. v. Maryland State Board of Censors, 210 Md. 586, 124 A. 2d 292.

[2-5] In the light of the difference between the issues presented here and in Times Film, the Court of Appeals erred in saying that, since appellant's refusal to submit the film to the Board was a violation only of § 2, "he has restricted himself to an attack on that section [56] alone, and lacks standing to challenge any of the other provisions (or alleged shortcomings) of the statute." 233 Md., at 505, 197 A. 2d at 236. Appellant has not challenged the submission requirement in a vacuum but in a concrete statutory context. His contention is that § 2 effects an invalid prior restraint because the structure of the other provisions of the statute contributes to the infirmity of § 2; he does not assert that the other provisions are independently invalid.

In the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an

administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license. "One who might have had a license for the asking may * * * call into question the whole scheme of licensing when he is prosecuted for failure to procure it." Thornhill v. State of Alabama, 310 U.S. 88, 97, 60 S. Ct. 736, 742, 84 L. Ed. 1093; see Staub v. City of Baxley, 355 U.S. 313, 319, 78 S. Ct. 277, 280-281, 2 L. Ed. 2d 302; Saia v. People of State of New York, 334 U.S. 558, 68 S. Ct. 1148, 92 L. Ed. 1574; Thomas v. Collins, 323 U.S. 516, 65 S. Ct. 315, 89 L. Ed. 430; Hague v. CIO, 307 U.S. 496, 59 S. Ct. 954, 83 L. Ed. 1423; Lovell v. City of Griffin, 303 U.S. 444, 452-453, 58 S. Ct. 666, 669, 82 L. Ed. 949. Standing is recognized in such cases because of the "* * * danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." NAACP v. Button, 371 U.S. 415, 433, 83 S. Ct. 328, 338, 9 L. Ed. 2d 405; see also Amsterdam, Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 75-76, 80-81, 96-104 (1960). Although we have no occasion to decide whether the vice of overbroadness infects the Maryland statute,[3] we think that appellant's assertion of a similar [57] danger in the Maryland apparatus of censorship—one always fraught with danger and viewed with suspicion—gives him standing to make that challenge. In substance his argument is that, because the

[3] Appellant also challenges the constitutionality of § 6, establishing standards, as invalid for vagueness under the Due Process Clause; § 11, imposing fees for the inspection and licensing of a film, as constituting an invalid tax upon the exercise of freedom of speech; and § 23, allowing exemptions to various classes of exhibitors, as denying him the equal protection of the laws. In view of our result, we express no views upon these claims.

apparatus operates in a statutory context in which judicial review may be too little and too late, the Maryland statute lacks sufficient safeguards for confining the censor's action to judicially determined constitutional limits, and therefore contains the same vice as a statute delegating excessive administrative discretion.

II.

[6] Although the Court has said that motion pictures are not "necessarily subject to the precise rules governing any other particular method of expression," Joseph Burstyn Inc. v. Wilson, 343 U.S. 495, 503, 72 S. Ct. 777, 781, 96 L. Ed. 1098, it is as true here as of other forms of expression that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." Bantam Books, Inc. v. Sullivan, supra, 372 U.S. at 70, 83 S. Ct. at 639. "* * * [U]nder the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity * * * without regard to the possible consequences for constitutionally protected speech." Marcus v. Search Warrant, 367 U.S. 717, 731, 81 S. Ct. 1708, 1716, 6 L. Ed. 2d 1127. The administration of a censorship system for motion pictures presents peculiar dangers to constitutionally protected speech. Unlike a prosecution for obscenity, a censorship proceeding puts the initial burden on the exhibitor or distributor. Because the censor's business is to censor, there inheres the danger that he may well be less responsive than a court—part of an independent

branch of government—to the [58] constitutionally protected interests in free expression.[4] And if it is made unduly onerous, by reason of delay or otherwise, to seek judicial review, the censor's determination may in practice be final.

[7-13] Applying the settled rule of our cases, we hold that a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system. First, the burden of proving that the film is unprotected expression must rest on the censor. As we said in Speiser v. Randall, 357 U.S. 513, 526, 78 S. Ct. 1332, 1342, 2 L. Ed. 2d 1460, "Where the transcendent value of speech is involved, due process certainly requires * * * that the State bear the burden of persuasion to show that the appellants engaged in criminal speech." Second, while the State may require advance submission of all films, in order to proceed effectively to bar all showings of unprotected films, the requirement cannot be administered in a manner which would lend an effect of finality to the censor's determination whether a film constitutes protected expression. The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensivity to freedom of expression, only a procedure requiring a judicial determination suffices to impost a valid final restraint. See Bantam

[4] See Emerson, The Doctrine of Prior Restraint, 20 Law & Contemp.Prob. 648, 656-659 (1955). This is well illustrated by the fact that the Maryland Court of Appeals has reversed the Board's disapproval in every reported case. United Artists Corp. v. Maryland State Board of Censors, supra; Maryland State Board of Censors v. Times Film Corp., 212 Md. 454, 129 A. 2d 833; Fanfare Films, Inc. v. Motion Picture Censor Board, 234 Md. 10, 197 A. 2d 839.

Books, Inc. v. Sullivan, supra; A Quantity of Books v. State of Kansas, 378 U.S. 205, 84 S. Ct. 1723, 12 L. Ed. 2d 809; Marcus v. Search Warrant, supra; Manual Enterprises, Inc. v. Day, 370 U.S. 478, 518-519, 82 S. Ct. 1432, 1453-1454, 8 L. Ed. 2d 639. To this end, the exhibitor must be assured, by [59] statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film. Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. Moreover, we are well aware that, even after expiration of a temporary restraint, an administrative refusal to license, signifying the censor's view that the film is unprotected, may have a discouraging effect on the exhibitor. See Bantam Books, Inc. v. Sullivan, supra. Therefore, the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.

Without these safeguards, it may prove too burdensome to seek review of the censor's determination. Particularly in the case of motion pictures, it may take very little to deter exhibition in a given locality. The exhibitor's stake in any one picture may be insufficient to warrant a protracted and onerous course of litigation. The distributor, on the other hand, may be equally unwilling to accept the burdens and delays of litigation in a particular area when, without such difficulties, he can freely exhibit his film in most of the rest

of the country; for we are told that only four States and a handful of municipalities have active censorship laws.[5]

[14] It is readily apparent that the Maryland procedural scheme does not satisfy these criteria. First, once the censor disapproves the film, the exhibitor must assume [60] the burden of instituting judicial proceedings and of persuading the courts that the film is protected expression. Second, once the Board has acted against a film, exhibition is prohibited pending judicial review, however protracted. Under the statute, appellant could have been convicted if he had shown the film after unsuccessfully seeking a license, even though no court had ever ruled on the obscenity of the film. Third, it is abundantly clear that the Maryland statute provides no assurance of prompt judicial determination. We hold, therefore, that appellant's conviction must be reversed. The Maryland scheme fails to provide adequate safeguards against undue inhibition of protected expression, and this renders the § 2 requirement of prior submission of films to the Board an invalid previous restraint.

III.

[15] How or whether Maryland is to incorporate the required procedural safeguards in the statutory scheme is, of course, for the State to decide. But a model is not lacking: In Kingsley Books, Inc. v. Brown, 354 U.S. 436, 77 S. Ct.

[5] An appendix to the brief *amici curiae* of the American Civil Liberties Union and its Maryland Branch lists New York, Virginia and Kansas as the three States having statutes similar to the Maryland statute, and the cities of Chicago, Detroit, Fort Worth and Providence as having similar ordinances. Twenty-eight of the remaining 39 municipal ordinances and codes are listed as "inactive."

1325, 1 L. Ed. 2d 1469, we upheld a New York injunctive procedure designed to prevent the sale of obscene books. That procedure postpones any restraint against sale until a judicial determination of obscenity following notice and an adversary hearing. The statute provides for a hearing one day after joinder of issue; the judge must hand down his decision within two days after termination of the hearing. The New York procedure operates without prior submission to a censor, but the chilling effect of a censorship order, even one which requires judicial action for its enforcement, suggests all the more reason for expeditious determination of the question whether a particular film is constitutionally protected.

[16] The requirement of prior submission to a censor sustained in Times Film is consistent with our recognition [61] that films differ from other forms of expression. Similarly, we think that the nature of the motion picture industry may suggest different time limits for a judicial determination. It is common knowledge that films are scheduled well before actual exhibition, and the requirement of advance submission in § 2 recognizes this. One possible scheme would be to allow the exhibitor or distributor to submit his film early enough to ensure an orderly final disposition of the case before the scheduled exhibition date—far enough in advance so that the exhibitor could safely advertise the opening on a normal basis. Failing such a scheme or sufficiently early submission under such a scheme, the statute would have to require adjudication considerably more prompt than has

been the case under the Maryland statute. Otherwise, litigation might be unduly expensive and protracted, or the victorious exhibitor might find the most propitious opportunity for exhibition past. We do not mean to lay down rigid time limits or procedures, but to suggest considerations in drafting legislation to accord with local exhibition practices, and in doing so to avoid the potentially chilling effect of the Maryland statute on protected expression.

Reversed.

Mr. Justice DOUGLAS, whom Mr. Justice BLACK joins, concurring.

On several occasions I have indicated my view that movies are entitled to the same degree and kind of protection under the First Amendment as other forms of expression. Superior Films v. Department of Education, 346 U.S. 587, 588, 74 S. Ct. 286, 98 L. Ed. 329; Kingsley International Pictures Corp. v. Regents, 360 U.S. 684, 697, 79 S. Ct. 1362, 1369, 3 L. Ed. 2d 1512; Times Film Corp. v. City of Chicago, 365 U.S. 43, 78, 81 S. Ct. 391, 410, 5 L. Ed. 2d 403.* For the reasons there stated, I do not [62] believe any form of censorship—no matter how speedy or prolonged it may be—is permissible. As I see it, a pictorial presentation occupies as

* The Court today holds that a system of movie censorship must contain at least three procedural safeguards of it is not to run afoul of the First Amendment: (1) the censor must have the burden of instituting judicial proceedings; (2) any restraint prior to judicial review can be imposed only briefly in order to preserve the status quo; and (3) a prompt judicial determination of obscenity must be assured. Thus the Chicago censorship system, upheld by the narrowest of margins in Times Film Corp. v. City of Chicago, 365 U.S. 43, 81 S. Ct. 391, could not survive under today's standards, for it provided not one of these safeguards, as the dissenters there expressly pointed out. Id., at 73-75, 81 S. Ct. at 407-408.

preferred a position as any other form of expression. If censors are banned from the publishing business, from the pulpit, from the public platform—as they are—they should be banned from the theatre. I would not admit the censor even for the limited role accorded him in Kingsley Books, Inc. v. Brown, 354 U.S. 436, 77 S. Ct. 1325, 1 L. Ed. 2d 1469. I adhere to my dissent in that case. Id., at 446-447, 77 S. Ct., at 1330-1331. Any authority to obtain a temporary injunction gives the State "the paralyzing power of a censor." Id., at 446, 77 S. Ct., at 1330. The regime of Kingsley Books "substitutes punishment by contempt for punishment by jury trial." Id., at 477, 77 S. Ct., at 1331. I would put an end to all forms and types of censorship and give full literal meaning to the command of the First Amendment.